

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

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SIG SAUER, INC., Plaintiff, \* 14-cv-147-PB  
\* v. \* July 17, 2015  
\* 2:10 p.m.  
\*  
\*  
THOMAS E. BANDON, Acting \*  
Director, Bureau of Alcohol, \*  
Tobacco, Firearms and \*  
Explosives, \*  
Defendant. \*  
\*  
\* \*

TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE PAUL J. BARBADORO

Appearances:

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1 BEFORE THE COURT

2 THE CLERK: Court is in session and has for  
3 consideration a motion hearing in Civil Case No.  
4 14-cv-147-PB, Sig Sauer, Inc. versus the U.S. Bureau of  
5 Alcohol, Tobacco, Firearms and Explosives.

6 THE COURT: I have a few questions before we  
7 get going. Basic issues. What statutes and regulations  
8 does the ATF rely on for its authority to issue  
9 classification letters?

10 MR. RYAN: Yes, your Honor, I am William Ryan,  
11 I've been appointed Special Assistant U.S. Attorney in  
12 this case for the Bureau of Alcohol, Tobacco, Firearms  
13 and Explosives.

14 Specifically, your Honor, the Department of  
15 Justice was given the authority by Congress to implement  
16 the GCA and the National Firearms Act. That was  
17 delegated down 28 CFR 0.130 to the director of ATF.

18 THE COURT: And that regulation says whatever  
19 authority we have in the Department of Justice to  
20 implement the law we delegate to the ATF.

21 MR. RYAN: That's right, sir.

22 THE COURT: All right. Is there any specific  
23 statute that authorizes you to issue classification  
24 letters?

25 MR. RYAN: Not the ATF specifically, sir.

1                   THE COURT: Or the Justice Department? Is  
2 there a regulation that says when somebody wants to know  
3 whether something qualifies as a firearm they can write  
4 in, and when they do, the ATF shall respond?

5                   MR. RYAN: No, your Honor, no shall respond --

6                   THE COURT: Anything, I want to know anything,  
7 is there any statute, or is there any regulation that,  
8 from which you derive authority to issue classification  
9 letters other than the CFR that you cite.

10                  MR. RYAN: Just as far as the Administrative  
11 Procedures Act is concerned, sir. In fact, there are  
12 specific sections in the Gun Control Act and the  
13 National Firearms Act such as sporting purposes and  
14 other things where ATF or the Attorney General delegates  
15 ATF must make determinations, but just as to what  
16 constitutes an every day run-of-the-mill firearm, it's  
17 just sent in by members of the industry who want to  
18 insure that they are in compliance with the general  
19 statute.

20                  THE COURT: Suppose you decided we're not  
21 going to respond to classification letters anymore.  
22 Would you be in violation of law?

23                  MR. RYAN: No, your Honor, not as in -- such  
24 an example might be a firearms license where we're  
25 required to grant the license or deny the license within

1 60 days.

2 THE COURT: That's what I'm trying to find  
3 out. You could have said to them, go pound sand, we  
4 don't feel like answering your question, and you would  
5 not have been in any way acting impermissible.

6 MR. RYAN: It just would have been impossible  
7 to then implement the law.

8 THE COURT: No, you could have them indicted  
9 after they violated the law; right?

10 MR. RYAN: Yes, sir, yes, sir.

11 THE COURT: But I just, I want to be very  
12 clear about this because I need you, you're the expert,  
13 if there is a statute or regulation that bears directly  
14 or indirectly on your authority to respond to  
15 classification letters, I want to know what it is,  
16 because there's no reference to it in the briefs.

17 You understand why I'm asking this, because  
18 the degree of deference owed to your judgment, your  
19 legal interpretation, may be affected by the authority  
20 that you are relying on when you express your position  
21 on things; right.

22 Okay, so I'm asking for is there a statute or  
23 regulation that governs this and says when you -- if  
24 someone wants to submit a request for classification,  
25 they shall do X. If we get a request for

1 classification, we will do Y, we will give you an  
2 opportunity to hold a hearing, we will let you submit  
3 records, we will give you a chance to object to our  
4 proposed ruling. There's none of that.

5 MR. RYAN: No, sir.

6 THE COURT: Okay.

7 MR. RYAN: There are examples in the  
8 regulation 27 CFR 478 and 479 that talk about, for  
9 example, if someone wants to find out if a firearm is  
10 importable. It can be temporarily imported. There are  
11 procedures which we will make a determination and  
12 determine whether it's importable under various tests  
13 and send it back.

14 THE COURT: Okay, so you do have some  
15 regulations that address these kinds of issues and  
16 establish formal procedures for resolving issues; right?

17 MR. RYAN: Yes, sir.

18 THE COURT: But you do not have any procedures  
19 that address the means by which you resolve this  
20 particular kind of question?

21 MR. RYAN: That's right, sir, this  
22 specifically.

23 THE COURT: Do you consider your response to a  
24 classification letter to have the force of law?

25 MR. RYAN: It does as it applies and as it

1 will be used in the future, your Honor. For example,  
2 when a classification is made as to sporting purpose or  
3 what is a handgun or a rifle, any of these things, that  
4 will be used in the future as precedential authority for  
5 whether that same firearm or similar firearm can get  
6 classification.

7 THE COURT: Well, okay, let's -- you  
8 understand that when you adopt a regulation that has the  
9 force of law to it, you have to comply with notice and  
10 comment procedures; right?

11 MR. RYAN: Yes, sir.

12 THE COURT: Okay. And if you don't comply  
13 with those procedures, your regulation doesn't have the  
14 force of law.

15 MR. RYAN: That's right, sir.

16 THE COURT: When you respond to a compliance  
17 letter, you are not complying with notice and comment  
18 procedures, you're not seeking views of the general  
19 public with respect to something. You are simply taking  
20 what they give you, doing whatever process internally  
21 you want to do and responding; right?

22 MR. RYAN: That's right, sir.

23 THE COURT: Now, is a response to a  
24 classification letter of this sort done by a central  
25 office of ATF?

1                   MR. RYAN: That's right, sir.

2                   THE COURT: Okay. And what I'm trying to  
3 figure out is, I'm surprised that you're suggesting that  
4 a -- your letter response has the force of law, that  
5 someone could go into court, say a criminal defendant,  
6 if you issue a letter that says X is not a firearm, that  
7 you believe they could take your classification ruling  
8 three years later in a criminal prosecution, come into  
9 my court, present that letter, and I would have an  
10 obligation to follow it.

11                  MR. RYAN: As far as the classifications go  
12 and the expertise that ATF has in this specific area,  
13 sir, the interstitial nature, also Barnhart types of --

14                  THE COURT: Well, suppose you submitted an  
15 amicus brief in the First Circuit on a particular issue.  
16 Do you think your amicus brief has the force of law?

17                  MR. RYAN: An amicus brief, sir, I don't  
18 believe so.

19                  THE COURT: Why does a classification letter  
20 have the force of law?

21                  MR. RYAN: Because of the nature of what it is  
22 that ATF is doing --

23                  THE COURT: Well, there may be deference owed  
24 to an ATF position in an amicus brief. That deference  
25 is owned to it doesn't mean that it has the force of

1 law. You believe you have law making powers to respond  
2 to a classification letter request, and that's a law  
3 making power that you have. That's an Article I law  
4 making power.

5 MR. RYAN: As far as there's no -- there's no  
6 specific, other than general language given by Congress  
7 of this is a silencer, this is a firearm, that's all  
8 kicked to the Executive Branch. The Executive Branch  
9 goes through, looks at those specific firearms-related  
10 issues, sir, and makes that classification as this is  
11 what a short barreled shotgun is or a silencer is.  
12 There's nothing given by the legislature other than a  
13 general sort of definition, sometimes. ATF has to take  
14 a specific example of a firearm --

15 THE COURT: And you don't see a difference  
16 between a regulation and your response to a  
17 classification letter?

18 MR. RYAN: I understand what you're saying,  
19 sir, and I do understand that. At the worst case  
20 scenario, even if Chevron deference isn't applied, we  
21 still --

22 THE COURT: We will get into the degree of  
23 deference that's owed to it. I'm just trying to  
24 understand what your position is as to what it is, and  
25 it's entirely possible that you could be entitled to

1 Chevron deference even though you don't adopt this in a  
2 regulation. You may be right about that. But I'm  
3 trying to understand what this thing is of yours, and it  
4 sounds like there's no procedure that requires you to  
5 issue it. There's no procedure that expressly  
6 authorizes you to issue it. You derive it from the  
7 delegated authority, the general authority that the DOJ  
8 has to administer the statute.

9 MR. RYAN: Yes, sir.

10 THE COURT: And you've adopted no regulations  
11 that deal with it.

12 MR. RYAN: Regulations that --

13 THE COURT: That deal with the authority and  
14 means and procedures and process that you use in issuing  
15 a classification letter.

16 MR. RYAN: Not generally. In specific  
17 scenarios, sir, importing items for classification, yes,  
18 by not as to the classification --

19 THE COURT: Except for those areas for which  
20 you have regulations that establish a classification  
21 procedure, you mention importing, but with respect to  
22 the issue we have here, you would agree that there is no  
23 regulation that expressly, and no statute, that  
24 expressly authorizes you to issue a classification  
25 letter.

1                   MR. RYAN: That's right, sir.

2                   THE COURT: Okay. So, if I am to infer that  
3 Congress intended you to interpret this statute in a way  
4 that would have force of law, it comes from the general  
5 authority granted to the Department of Justice to  
6 implement the statute.

7                   MR. RYAN: Yes, sir, specifically it would be  
8 impossible to implement the statute without knowing  
9 which of these things is a firearm.

10                  THE COURT: And -- well, right, but the  
11 Executive Branch does a whole lot of things every single  
12 day without creating law as to how a statute is  
13 implemented, and many of those things, in fact most of  
14 those things are reviewed by the court de novo, or  
15 they're reviewed by the court and the court, the  
16 Department of Justice makes its position clear to me.  
17 Every time I have a criminal prosecution, they don't  
18 produce a letter from the director of ATF and say this  
19 is what the statute means, you are bound by law to  
20 follow the director of ATF's interpretation of this.  
21 They say, judge, we want you to adopt this  
22 interpretation. And I either adopt it or I don't.

23                  That's normally the way statutes are  
24 interpreted in our legal system.

25                  MR. RYAN: Yes, sir.

1                   THE COURT: There are occasions where agencies  
2 give interpretations that have the force and effect of  
3 law, and there are occasions where the agencies give  
4 interpretations while doing other things that they do  
5 that are entitled to degrees of deference and, but they  
6 don't have the force of law. They are useful and in  
7 some cases the degree of deference may be strong enough  
8 that if the agency's interpretation is plausible, it has  
9 to be followed, but it doesn't mean that the agency's  
10 interpretation has the force of law until the court  
11 applies Chevron deference and says this is what the  
12 statute means. So, that's why I'm asking this point  
13 about force of law.

14                   Okay, let's talk about a different subject. I  
15 need an answer from both of you on this. Do you agree  
16 that whatever it is you've done in this case qualifies  
17 as final agency action for purposes of the  
18 Administrative Procedure Act?

19                   MR. RYAN: Yes, sir, it's the government's  
20 position that this does qualify as final --

21                   THE COURT: And that means that it is ripe for  
22 review under the APA.

23                   MR. RYAN: Yes, sir.

24                   THE COURT: Do you agree that this is final  
25 agency action?

1                   MR. HALBROOK: Your Honor, yes. I'm Stephen  
2 Halbrook for Sig Sauer, and we allege that in the  
3 complaint and it was agreed to in the answer to the  
4 complaint that it is final agency action, yes, sir.

5                   THE COURT: Okay. So what kind of action is  
6 this? It is not rule making. Would we agree on that?

7                   MR. HALBROOK: Yes, your Honor.

8                   THE COURT: Do you agree it's not rule making?

9                   MR. RYAN: Yes, your Honor.

10                  THE COURT: Do you agree it's not formal  
11 agency adjudication?

12                  MR. RYAN: Yes, your Honor.

13                  THE COURT: Do you agree?

14                  MR. HALBROOK: We agree.

15                  THE COURT: It appears to me to be informal  
16 agency adjudication. Do you agree with that?

17                  MR. HALBROOK: We agree, yes, your Honor.

18                  THE COURT: Do you agree with that?

19                  MR. RYAN: Yes, your Honor.

20                  THE COURT: Do you agree that therefore it is  
21 subject to review under the APA under the arbitrary and  
22 capricious standard in Section 706 as informal agency  
23 action. Do you agree?

24                  MR. HALBROOK: Arbitrary and capricious or  
25 contrary to law.

1                   THE COURT: Contrary to law, that standard in  
2 Section 706 which I referred to in shorthand form.

3                   MR. HALBROOK: Yes, your Honor.

4                   THE COURT: Do you agree?

5                   MR. RYAN: Yes, your Honor.

6                   THE COURT: Okay. Those are very important  
7 considerations.

8                   I have a question I don't know the answer to.  
9 If we have final agency action that is informal agency  
10 adjudication subject to the APA, can someone circumvent  
11 the APA by bringing a federal declaratory judgment  
12 action to obtain the same interpretation using de novo  
13 review under the Declaratory Judgment Act, or does the  
14 fact that there is a right to review under the APA  
15 preclude separate review under a different standard  
16 under the Declaratory Judgment Act.

17                  Do you have a thought about that?

18                  MR. HALBROOK: Yes, your Honor, that's why we  
19 brought two counts in the complaint. One of them APA  
20 and the other Declaratory Judgment Act.

21                  Traditionally where there's a dispute about  
22 whether a criminal law applies, whether the apple is  
23 poison, you don't have to eat it. That was the whole  
24 purpose of the Declaratory Judgment Act. And that's why  
25 we brought this action under that as well as the APA

1 because we have a classification by ATF it would be a  
2 crime for us to make this product and distribute it in  
3 commerce --

4 THE COURT: But I don't ordinarily review  
5 questions under the Declaratory Judgment Act under the  
6 arbitrary and capricious standard.

7 Let me cut right to the point. It seems to  
8 me, although I have not researched the issue, that if  
9 you have an action that's reviewable under the APA and  
10 is subject to arbitrary and capricious review, you as a  
11 plaintiff couldn't come into this court and bring only a  
12 declaratory judgment claim and argue to me I should  
13 determine that issue de novo and not apply arbitrary and  
14 capricious review to the agency's action. I should  
15 conduct a full trial on the merits, hear evidence, make  
16 my own findings of fact, and issue or not issue a  
17 declaratory judgment.

18 It seems instead that I should treat this as  
19 an administrative procedure act, administrative record  
20 review case, and ask myself as a matter of law was the  
21 action of the agency arbitrary, capricious and otherwise  
22 not in accordance with law. I shouldn't conduct some  
23 kind of separate declaratory judgment at trial and  
24 decide de novo whether I would reach the same  
25 conclusions on my own.

1                   Do you agree with that?

2                   MR. HALBROOK: Your Honor, it seems maybe in  
3 some cases there will be a convergence with the APA  
4 standard and what would otherwise be a declaratory  
5 judgment act, action in any event. Is the statute  
6 clear? Does it apply, in the case of statutes under the  
7 criminal code, Title 18, like we have here? Other rules  
8 intervene that --

9                   THE COURT: Let me stop you and try an example  
10 to explain what I'm concerned about.

11                  Assume that the ATF did not have a  
12 classification procedure here; right? Assume that they  
13 said to you when you sent them, we're proposing to  
14 manufacture something. If we don't do it right, we may  
15 be committing crime. We think we're going to be doing  
16 it right and it's not a crime, will you please tell us.  
17 And they say to you, we're not talking. Figure it out.  
18 After you manufacture, if you violate the law, we'll  
19 indict you. You would come into court and seek a  
20 declaratory judgment and say we don't have to face  
21 indictment to get an answer to this question.

22                  Right?

23                  MR. HALBROOK: Correct, your Honor.

24                  THE COURT: And if we did that, as I do all  
25 the time, people come in and say, okay, judge, we need a

1 discovery plan, we need a motion practice deadline, we  
2 need an expert disclosure deadline, and we need a trial  
3 date, and we go through all of that, then we have a  
4 little trial, a little bench trial. And you call a  
5 bunch of witnesses and they call a bunch of witnesses,  
6 and I hear the evidence and I decide is this legal or is  
7 it not, and I grant or deny the request for a  
8 declaratory judgment. That's a very, very, very  
9 different process from what I would do in an APA case.

10 In an APA case I would say APA decisions are  
11 ordinarily administrative record review cases. I  
12 received the administrative record, as I do 10 or 15  
13 times a year with Social Security cases, I receive the  
14 administrative review record, I review the  
15 administrative record, I determine whether there's  
16 substantial evidence to support the judgment that the  
17 ALJ made, I determine whether the ALJ violated the law  
18 in any particular way, and then I give an answer without  
19 taking evidence.

20 It seems to me that this case is that kind of  
21 case. It's an administrative record review case using a  
22 Section 706 standard of review, and there isn't going to  
23 be a trial in this case and there isn't going to be any  
24 evidence in this case, and I make a determination as to  
25 what -- whether what the agency did is arbitrary,

1 capricious and not otherwise in accordance with law, and  
2 then I'm done.

3 You agree or disagree?

4 MR. HALBROOK: That's the way most of these  
5 cases are handled. The court is allowed, if there is  
6 still some question about evidence, to take further  
7 evidence. It's usually done with a supplemental  
8 declaration. But in a case that's particularly complex,  
9 I have a case I wanted to cite about even in an APA  
10 review case, additional evidence can be taken --

11 THE COURT: I'm willing to acknowledge that  
12 there are theoretical occasions in which you can receive  
13 evidence. I will acknowledge that. There may be cases  
14 in which a court would need to receive evidence. If  
15 there was -- if it was an allegation that the hearing  
16 officer outside the presence of the record met with the  
17 parties and said X, Y or Z, of course you would need to  
18 receive evidence about what happened.

19 But would you agree with me that the typical  
20 APA case is administrative record review?

21 MR. HALBROOK: That's very typical, but also  
22 keeping in mind the typical case does not involve  
23 construction of a criminal statute. So, if there's a  
24 gap in what is needed in, like in summary judgment or if  
25 there needed to be a limited factual hearing, we would

1 think the court would want to go there just --

2 THE COURT: Let me try to put it to you more  
3 specifically. I do not see that there's any need for a  
4 trial in this case. I do not see that there is any need  
5 for evidence in this case. You haven't suggested to me  
6 that there's a need for trial or evidence. I'm prepared  
7 to resolve this case under the APA Section 706 and ask  
8 myself whether it's arbitrary, capricious or not  
9 otherwise in accordance with the law based entirely on  
10 the administrative record. I don't believe you contend  
11 that I can't do that. I don't believe that the ATF  
12 contends that I can't do that. Indeed, I believe you  
13 both suggest that I can and should do that.

14 Is that true or not?

15 MR. HALBROOK: That's absolutely true. We  
16 think that --

17 THE COURT: Do you agree with that as well?

18 MR. RYAN: We do, your Honor.

19 THE COURT: So there's no need for a trial  
20 here; is that right?

21 MR. HALBROOK: Yes.

22 THE COURT: You don't think there is a need  
23 for a trial, you don't think there's a need for a trial,  
24 I don't think there's a need for a trial. There isn't  
25 going to be a trial. Everybody agree?

1                   MR. HALBROOK: We agree, your Honor.

2                   THE COURT: Okay, so the trial is off. Okay,  
3 that's useful, that's useful because you don't have to  
4 prepare for a trial, but it's also useful because we now  
5 have a case that will be decided based solely on the  
6 administrative record; correct? You both agree?

7                   MR. HALBROOK: We don't think the facts are in  
8 dispute, your Honor.

9                   THE COURT: All right. So, and because we are  
10 deciding the case based on the administrative record, it  
11 is also true that the summary judgment standard is  
12 essentially meaningless in this context. Do you agree  
13 with that?

14                  MR. HALBROOK: We agree, I mean, if there is  
15 no factual issues that need to be resolved and --

16                  THE COURT: You don't even use the summary  
17 judgment standard because there isn't going to be any  
18 fact finding, okay? There's really --

19                  MR. HALBROOK: Correct.

20                  THE COURT: -- just a legal issue. The legal  
21 issue is did the ATF act arbitrary and capriciously or  
22 otherwise in accordance with law, and that is a pure  
23 legal standard, and that standard is determined based on  
24 my view of the administrative record. Therefore there  
25 is no facts to be found. There's no possibility that

1 there are facts that are in dispute that would prevent  
2 me from resolving the case. There are no inferences  
3 that should be granted in favor of or against the moving  
4 party or the party opposing the motion. There's none of  
5 that complexity.

6 When we resolve a Social Security case in this  
7 court, we have a motion for order affirming the decision  
8 of the secretary and a motion objecting to that and a  
9 motion to reverse. That's effectively what we have  
10 here.

11 You've read Judge Bates's decision in his gun  
12 case; right? You read that?

13 MR. RYAN: That's right.

14 THE COURT: What's the name of the case?

15 MR. RYAN: Innovators.

16 THE COURT: Innovators. You've read  
17 Innovators; right?

18 MR. HALBROOK: Yes, your Honor, yes.

19 THE COURT: He makes this point in Innovators.  
20 Do either of you disagree with the point he makes in  
21 Innovators that summary judgment doesn't have, there  
22 isn't a role to play -- I'm not suggesting we leave here  
23 without a decision. I'm ready to take your briefs and  
24 decide the case, but I don't believe it's appropriate to  
25 use the summary judgment standard to do so; rather, I

1 believe it's appropriate to use the APA standard in 706.

2 If one of you disagrees, speak now or forever  
3 hold your peace.

4 MR. HALBROOK: Just so it's understood, your  
5 Honor, we believe that the facts are not in dispute and  
6 that it's an issue of law for the Court to decide. We  
7 don't agree that any deference is accorded to the  
8 agency, and we want to emphasize that it is a criminal  
9 statute, and the same rule that the Court decides in  
10 this case would have to apply in a criminal case.

11 THE COURT: Well, I'm going to be asking you  
12 to be even clearer because that's not a clear answer to  
13 my question. I want you to be even clearer than that  
14 and I want you to answer this question.

15 Do you agree that summary judgment, which  
16 involves according inferences, construing evidence in  
17 the light most favorable to the non-moving party,  
18 applied neither to your motion for summary judgment nor  
19 your cross motion for summary judgment, neither of you  
20 can claim the benefit of that standard because it  
21 doesn't make any sense to use it in an administrative  
22 record review case, that's why we don't use it in Social  
23 Security cases which is the most common we do in this  
24 court maybe 60 of them a year, you know, so I'm using  
25 that as an example.

1                   Do you agree that the summary judgment  
2 standard, and in particular the summary judgment  
3 standard which requires that the court give the benefit  
4 of inferences to the non-moving party, that that simply  
5 doesn't play a role in the decision of this case?

6                   MR. HALBROOK: We're not relying on that  
7 principle in this case, your Honor.

8                   THE COURT: Okay, well, don't rely on the  
9 Court of Appeals if you get an outcome you don't like,  
10 because I've asked you to try to persuade me now, and if  
11 you're not willing to make that argument now, you  
12 shouldn't be able to make it in the Court of Appeals.  
13 Do you also agree?

14                   MR. RYAN: Yes, your Honor.

15                   THE COURT: Okay, that's helpful because,  
16 again, as I write this order, I'm going to write it, I'm  
17 going to say, and there's Judge Bates's decision refers  
18 to District of Columbia Circuit law, but there's First  
19 Circuit law that essentially says the same thing, they  
20 describe it somewhat differently, but there's no summary  
21 judgment in these kinds of cases because there are no  
22 facts in dispute, there are no facts to be found, so you  
23 don't -- it would be unnecessarily complicated for me to  
24 analyze your motion according, for instance, for the  
25 other side, analyze their motion, accord inferences to

1 you. It leaves the possibility that I couldn't decide  
2 the case because deciding one way I can't grant your  
3 motion, deciding another way I can't grant their motion.  
4 It's absurd. And I think if you think about it you will  
5 agree on that point, okay.

6 So, we've established some very important  
7 things which are there are no statutes or regulations  
8 that expressly authorize you to issue classification  
9 letters. This is final agency action. There is no need  
10 for a trial. There is no separate federal declaratory  
11 judgment statute motive of analyzing this case. It's  
12 analyzed as an APA 706 case which will be based entirely  
13 on the administrative record and subject to the Section  
14 706 standards.

15 Anybody disagree, speak now.

16 MR. HALBROOK: We're in accord with that, your  
17 Honor.

18 MR. RYAN: Yes, your Honor.

19 THE COURT: Okay. Good. All right, that's  
20 very important. I think that's very helpful. I  
21 appreciate that.

22 Now, we can go ahead and have you present. I  
23 think probably the best way is for the ATF to defend its  
24 decision, and then you can respond to how they, what  
25 they have to say. If you've been briefed on how I like

1 to proceed, you'll probably realize that I spend as much  
2 time asking questions as you do just speaking so, and  
3 I'll ask you both to --

4 MR. ROUVALIS: We tried to prepare them for  
5 that.

6 THE COURT: I will ask you both to stand up at  
7 various times. We will start with the structure of you  
8 generally defending your decision and then you can  
9 respond.

10 MR. HALBROOK: Thank you, your Honor.

11 THE COURT: I want to assure everybody that I  
12 will stay until I've heard every last word that someone  
13 wants to say. I may not let you say what you want to  
14 say when you want to say it, but just make a note and  
15 I'll give you a chance to say whatever you want before  
16 we conclude the hearing, okay?

17 All right, so why don't you go ahead.

18 MR. RYAN: Yes, your Honor. Thank you. Since  
19 the 1970s ATF has been familiar with something called a  
20 monolithic baffle stack. That was when the technology  
21 came out and was used in silencers in certain machine  
22 guns. The firearm at the center of this case is called  
23 the MPX, and the plaintiff developed this firearm for  
24 law enforcement and military purposes. It's a short  
25 barreled machine gun, short barreled being necessary in

1 military and law enforcement applications for going down  
2 hallways, tight spaces, you don't have a long barrel  
3 sticking out.

4 THE COURT: What's the difference in terms of  
5 your regulatory authority depending upon the length of  
6 the barrel?

7 MR. RYAN: The length of the barrel is  
8 specific. A long rifle, for example, your Honor, or one  
9 with a barrel over 16 inches in length is just a GCA  
10 firearm. That's under the Gun Control Act.

11 If it falls to under 16 inches in length, now  
12 it's consider a National Firearms Act firearm and it's  
13 regulated under the Tax Code as well.

14 THE COURT: All right, so, if this as  
15 marketed, if it's not a silencer, it's a, and your  
16 acronyms escape me, but it's the less regulated, less  
17 problematic for them why it isn't taxed the same way, et  
18 cetera.

19 MR. RYAN: Yes, sir.

20 THE COURT: So that's the reason that they try  
21 to extend this thing out to make the total barrel length  
22 16 inches so they can get out from under your regulatory  
23 regime.

24 MR. RYAN: Under the Tax Code, yes, sir.

25 THE COURT: Under the Tax Code, right, so it

1 doesn't cost as much to sell it because they don't have  
2 to pay a tax every time they sell one. Is that what it  
3 is?

4 MR. RYAN: It's really, sir, that the buyer  
5 doesn't have to pay a tax to get it and get into a  
6 registry. They can just go to a gun store and buy it.

7 THE COURT: Okay. So, they took a gun which  
8 they would have to, for which a buyer would have to pay  
9 a tax, and they stick this thing on it, and it's long  
10 enough now that they don't have to pay a tax.

11 MR. RYAN: That's right. If it's permanently  
12 attached, your Honor, and ATF said for a long time, if  
13 it's permanently attached, the barrel now measures over  
14 16 inches in length, then because of the barrel length  
15 it's not regulated.

16 THE COURT: What are the other, if any,  
17 consequences of barrel length being over 16 inches in  
18 length that I should know about. Are there any other  
19 consequences? Is it just a tax?

20 MR. RYAN: Well, there are certain provisions.  
21 For example, in the Gun Control Act, an 18-year-old can  
22 buy these if they are a regular long rifle meaning the  
23 barrel is over 16. So there are various things like  
24 that, interstate issues, things like that.

25 THE COURT: Are there any crimes where the

1 nature of the crime is different if it is not a long  
2 barreled firearm?

3 MR. RYAN: I believe so, your Honor. I think  
4 there are some -- I believe there are some sentencing  
5 types of issues if you use a National Firearms Act  
6 weapon illegally as compared to just a regular weapon.

7 THE COURT: And about if you sell one of these  
8 firearms that's not a long barrel, but you sell it as if  
9 it's a short barreled one, is that a crime?

10 MR. RYAN: In order to sell it you would need  
11 to have it registered to the person who takes it. So  
12 you can never possess one of the short barreled rifles  
13 without having it first be registered to the possessor.

14 THE COURT: Okay, but suppose you're Sturm  
15 Ruger, and instead of getting a classification letter  
16 they just went out and built this thing and market it  
17 and started selling it, and they sold it as a, this is  
18 not a National Firearms Act weapon, you don't have to  
19 pay a tax, you don't have to register. Would they be  
20 committing a crime by doing that?

21 MR. RYAN: That would be the criminal case you  
22 were speaking about before, sir, and exactly the  
23 scenario where you were asking us the questions. The  
24 question would be, now, when ATF goes to trial on that  
25 do they win under the law.

1                   THE COURT: What is the crime of selling a  
2 short-barreled rifle without complying with the National  
3 Firearms Act?

4                   MR. RYAN: Under Section 5861, sir, of the Tax  
5 Code, unregistered possession, selling without having  
6 the proper registration, paying the tax even, either the  
7 \$200 making tax or the special occupancy tax that the  
8 licensed manufacturer can have.

9                   THE COURT: So Sturm Ruger -- I'm used to the  
10 other statute which makes it a crime if you're a felon  
11 in possession of a gun and things like that. I don't do  
12 prosecutions under this other statute so I want to  
13 understand it.

14                  MR. RYAN: Yes, sir.

15                  THE COURT: So you're telling me that if Sturm  
16 Ruger, instead of using a classification letter, went  
17 out and manufactured this, every time they shipped one  
18 to another person, transferred possession of it like to  
19 Wal-Mart or something, every time one of those was sold  
20 without paying a tax, they would be committing a crime.

21                  MR. RYAN: Yes, sir.

22                  THE COURT: For which the company could be  
23 indicted, the principals could be indicted, people could  
24 end up going to jail over it.

25                  MR. RYAN: That's right, sir.

1                   THE COURT: Okay. All right.

2                   MR. RYAN: That's right, sir. And so the MPX  
3 in this case --

4                   THE COURT: Can I ask you about it in even  
5 more detail.

6                   MR. RYAN: Yes, sir.

7                   THE COURT: Tell me about silencers. How does  
8 the law -- I know a silencer is a firearm for purposes  
9 of the statute that I deal with every day, so that if  
10 you're in possession of a silencer and you're a  
11 convicted felon, you're going to get in trouble, okay.  
12 Do the same registration and taxation requirements apply  
13 to sales of silencers that apply to short-barreled guns?

14                  MR. RYAN: Yes, your Honor.

15                  THE COURT: Okay.

16                  MR. RYAN: What's nice about silencers is it's  
17 actually the one firearm where it completely overlaps  
18 GCA --

19                  THE COURT: So it's identical. It's a  
20 silencer under the GCA, it's a silencer under the NFA.

21                  MR. RYAN: Yes, sir.

22                  THE COURT: And if you transfer possession  
23 without appropriate registration of the silencer without  
24 paying the appropriate tax, you can be guilty of a crime  
25 for giving it to somebody, you can be guilty of a crime

1 for possessing it. Fair to say?

2 MR. RYAN: That's correct, your Honor.

3 THE COURT: Okay. So again, if Sturm Ruger  
4 were to sell these things and what's on the end of this  
5 thing is a silencer, they would be committing a crime  
6 under this tax statute that you're talking about.

7 MR. RYAN: That's correct, sir.

8 THE COURT: All right. Thank you. Go ahead.

9 MR. RYAN: So, one of the things that or one  
10 of the variants that the MPX has is an integral silencer  
11 and also one that they can accept an attachable  
12 silencer.

13 In order to avoid all those issues we just  
14 spoke about, sir, what --

15 THE COURT: What you're calling a silencer, is  
16 that a part or is that an assembly of parts?

17 MR. RYAN: It's all of the above, sir, and --

18 THE COURT: Well, in your brief you seem to --  
19 in your letter on classification you seem to treat it as  
20 a part.

21 MR. RYAN: That's right.

22 THE COURT: You don't in your letter treat it  
23 as an assembly of parts, do you?

24 MR. RYAN: And it's not a device, sir, that's  
25 correct.

1                   THE COURT: So, for purposes of the statute,  
2 your argument survives or fails by treating this as a  
3 part.

4                   MR. RYAN: Well, I would point out that in  
5 that classification letter there was actually the  
6 reference to the combination of parts.

7                   THE COURT: Yeah, but you're not basing the  
8 denial on that. You're basing the denial on the part  
9 provision; right?

10                  MR. RYAN: The difficulty in this, sir, is  
11 that the monolithic baffle is sort of a unique design in  
12 that where it would be several parts, it's now made into  
13 a single part just because of manufacturing technology.

14                  THE COURT: I brought down my wrong file. I'd  
15 ask my clerk to go up. I have an expandable file with  
16 all my materials in it. It's either on my desk or some-  
17 where in my office, and in particular I'm looking for  
18 that little page I gave you guys yesterday with the  
19 statute on it. If you can -- do you have a copy of that  
20 here?

21                  Would you agree with me that you can have a  
22 silencer under the statute in one of three ways. It can  
23 be a silencer. It can be a part. Or it can be a, I  
24 don't have the exact language in front of me, but  
25 basically a combination -- yeah, it can be a silencer,

1 it can be a combination of parts, or it can be a part  
2 and be a silencer.

3 MR. RYAN: Yes, sir.

4 THE COURT: Your letters and all of your  
5 documents when I read them say to me that it's a  
6 silencer because it's a part intended only for use in an  
7 assembly or fabrication. That's the only argument I see  
8 you making in your letters. Have I misread you?

9 MR. RYAN: I don't think so, sir.

10 THE COURT: Okay. So your case rises or falls  
11 solely on whether it's a part.

12 MR. RYAN: Yes, sir.

13 THE COURT: If it's not -- if you're not  
14 relying on the language an assembly of -- excuse me, a  
15 combination of parts, you're relying on the part  
16 provision.

17 MR. RYAN: Yes, your Honor. The letter from  
18 FATD specifically talks about the part, although --

19 THE COURT: Now, you know why, I'm sure, as  
20 you prepared for this argument, you understand why I am  
21 asking that, because you've chosen of the three  
22 provisions, the one that's hardest to qualify under;  
23 right?

24 MR. RYAN: Yes, sir, we understand.

25 THE COURT: So, the combination of parts

1 provision, you can qualify as a silencer if it's  
2 intended for use in assembling or fabricating a  
3 silencer, even if it's also intended for use in  
4 manufacturing a muzzle brake. So, if you have a dual  
5 use assembly of parts that is intended for both  
6 purposes, you can regulate as a silencer; right?

7 MR. RYAN: That's right, sir.

8 THE COURT: But if you have a part -- if you  
9 have a part that is intended -- that is used in  
10 assembling a silencer, you can treat that part as a  
11 silencer. The only case when you can't is if it is  
12 intended only for use in a silencer; right?

13 MR. RYAN: Understand, yes, sir.

14 THE COURT: So if the part can be -- is  
15 intended for more than use as a silencer, it's intended  
16 for use as a silencer, but it's also intended for use as  
17 a muzzle brake, it's not a silencer.

18 MR. RYAN: Understand that, sir.

19 THE COURT: You agree?

20 MR. RYAN: Yes, sir.

21 THE COURT: Okay. Because you've chosen to  
22 rely on only the third section, your decision stands or  
23 falls on whether your decision that this was a part  
24 intended only for use in the fabrication of a silencer  
25 was arbitrary, capricious or otherwise not in accordance

1 with the law?

2 MR. RYAN: That's correct.

3 THE COURT: You agree with all that?

4 MR. RYAN: Yes, sir.

5 THE COURT: I really appreciate your frankness  
6 in answering your question. It makes your case much  
7 more difficult for you, but I appreciate your answer.

8 Let me ask you this. So, I'll be frank with  
9 you. The two concerns I have with your case, that's one  
10 of them, that I don't see you in any of your materials  
11 in any way responding to their suggestion that this is  
12 intended for use only as a silencer. I see you making a  
13 case for what I call objective intent as the appropriate  
14 standard, and I think that's what you're relying on, and  
15 I think we can talk about that, whether that standard  
16 should be, how much deference should be given to your  
17 view on that point, but, so, but the second argument is  
18 independent of that.

19 Assume that you're right, that we use  
20 objective intent, okay, objectively intended only if it  
21 subjectively is intended for both and if it objectively  
22 can be used for both, would you agree that the standard  
23 is not met?

24 MR. RYAN: I'm sorry, sir.

25 THE COURT: You have trouble following me?

1 I'm sorry if I'm not clear.

2 MR. RYAN: I'm not sure I understand, sir,  
3 because the question would be what is that -- how do you  
4 get to that standard. This is not a unique or novel or  
5 innovative design. It's a run-of-the-mill silencer.

6 THE COURT: I have to tell you, it looks to me  
7 like they manufactured the internal part of a silencer,  
8 they welded it to the gun to get it above 16 inches, and  
9 you just need to put a sleeve over it and you've got  
10 your standard issued silencer, that's what it looks to  
11 me as a layperson, but that's not the issue I'm talking  
12 to you about, okay. I'm talking to you about a very  
13 different -- and I'm sorry, sometimes I'm not as clear  
14 as I should be, so I want to go back over this with you,  
15 okay.

16 One of two problems I have with your analysis  
17 here is this problem dealing with the word only, okay.  
18 And in trying to figure out that problem, I'm going to  
19 accept that you're right about objective intent. The  
20 basic theory of your letters are when we say -- when the  
21 statute says intend, it means objectively intended, it  
22 doesn't mean subjectively intend, it means objectively  
23 intend, and we looked at all the evidence and we say  
24 it's objectively intended to be used as a silencer.  
25 That's what you say, okay, I think. And you're nodding

1 your head yes, so you basically agree with that.

2           But I'm saying to you even if you're right  
3 about all of that, there's still a huge problem for you  
4 because it's not enough to show that it's objectively  
5 intended to be used as a silencer, you have to show it's  
6 objectively intended to be used only for a silencer.

7 And what these folks have said over and over and over  
8 again to you is, we want to use this as a muzzle brake,  
9 okay. And you say, well, yeah, subjective intent, it's  
10 not controlling.

11           But then they went further and they said  
12 here's all the data showing you that it functions as a  
13 muzzle brake. You don't in any way respond to their  
14 argument that even if -- their argument is even if you  
15 think that we're intending to use this as a silencer,  
16 and even if you're intending -- you think we're  
17 objectively intending to use it as a silencer, we are  
18 also using it as a muzzle brake, and because we are, and  
19 because it functions that way, it's objectively intended  
20 to be used as a muzzle brake, and the statute has only  
21 with respect to a part in it, for a very good reason,  
22 and that is Congress was very concerned about these  
23 kits; right? That's what prompted the adoption of this  
24 amendment with these last two provisions. And it's  
25 quite clear they wanted to ban assemblies. But there

1 comes a problem when you talk about a single part, okay.

2 Suppose Company A makes an assembly with  
3 everything but a screw in it; right? That assembly is  
4 going to be regulable under that second theory. But the  
5 screw is only going to be regulable under the third  
6 theory; right? And the problem with that is screws can  
7 and are used for all kinds of things. And the ATF  
8 doesn't have the power to ban the sale of screws. You  
9 see what I'm saying?

10 MR. RYAN: That's correct.

11 THE COURT: And Congress wrote this provision  
12 exactly this way because they wanted to talk about dual  
13 use parts, and say dual use parts can be sold even if  
14 they can be used in a silencer. And it seems to me one  
15 of the fundamental problems with what you're doing here  
16 is you're saying this functions as a silencer, all you  
17 need is a sleeve to make it one, because it functions  
18 that way it's objectively intended to be a silencer  
19 because people objectively intend what inevitably  
20 follows from what they do, and therefore we win, it's a  
21 silencer. But you don't in any way embrace or even  
22 examine or talk about this second argument in any of  
23 your letters. And if you have, could you point it out  
24 to me, because that's one of the two problems I'm having  
25 with your argument.

1                   MR. RYAN: Well, that's what all the testing  
2 was about, sir, and what we talked about --

3                   THE COURT: I know, but did you say in there  
4 it doesn't function as a muzzle brake. We looked at it  
5 and it doesn't serve to be a brake.

6                   MR. RYAN: No, your Honor, because all  
7 monolithic baffle stats will function that way.

8                   THE COURT: That's right, that's the problem.  
9 It's a loophole in the statute. Believe me, it looks  
10 like a loophole in the statute, but it's a loophole  
11 that's rational and reasonable and not insane. It's a  
12 loophole that exists because Congress was concerned  
13 about we don't want to ban dual use items. We want to  
14 have the ability to sell dual use items unless they are  
15 an assembly of its intended for use as a silencer. And  
16 that's a highly rational way that Congress might want to  
17 address this issue. It isn't necessarily the way I  
18 would have addressed it, but if it's a rational way that  
19 they addressed it, you've got to address it in your  
20 answer. And in order not to be arbitrary and  
21 capricious, you've got to engage with them on that  
22 central point.

23                  Now, if you said in your response, we've  
24 tested this and it doesn't function as a muzzle brake,  
25 therefore, it can't be intended to be a muzzle brake,

1 you'd have no trouble if the evidence supported that.  
2 Or if you had said, we don't think this is objectively  
3 intended to function as a muzzle brake because we looked  
4 at all the muzzle brakes on the market and yours is so  
5 much less effective than all of those that you couldn't  
6 possibly gain any market share by selling this,  
7 therefore, you couldn't objectively intend to sell this  
8 as a muzzle brake. You'd be okay if the evidence  
9 supported you in that. But you didn't say anything  
10 about it.

11 MR. RYAN: The problem is, your Honor, I think  
12 that nothing would be a silencer, the law would be  
13 rendered moot --

14 THE COURT: No, you know, that's a nice  
15 argument but it's completely factually wrong, because  
16 every assembly, every actual silencer, if it's  
17 objectively intended to be a silencer, is a silencer,  
18 okay? Wait, let me finish. And every assembly of parts  
19 that's intended to be -- objectively intended to be a  
20 silencer, would be a silencer. So you could regulate  
21 all kinds of silencers by giving this language its  
22 ordinary meaning.

23 And let me be clear. You have an argument  
24 about how to interpret the statute on intended, but you  
25 haven't presented any argument that the third prong of

1 the statute, when it says only, doesn't mean only. If  
2 you're making the argument that it doesn't mean only  
3 because it would be absurd for it to mean only, tell me  
4 what --

5 MR. RYAN: The third part of that statute  
6 would be rendered meaningless, your Honor, and I didn't  
7 mean to suggest the whole thing, the third part, the  
8 part intended only clause.

9 THE COURT: No, it wouldn't be, it would be  
10 narrowed, but it would be -- see, because when -- and I  
11 understand, you guys have a laser like focus on trying  
12 to keep firearms from getting into the wrong hands,  
13 regulating them appropriately, and I understand that,  
14 and that's a very important function that you are  
15 serving, but what did Congress mean when it inserted the  
16 word only in that third provision? You tell me.

17 MR. RYAN: Well, I believe that they wanted to  
18 avoid having things like a coke bottle, for example, or  
19 some other legitimate item that you point out be  
20 regulated as a silencer all by itself.

21 THE COURT: Okay.

22 MR. RYAN: What's happened here is the  
23 plaintiff has taken that whole dynamic and flipped it  
24 around. What they've done is they've taken something  
25 that they developed as a silencer and sold as a

1 silencer, and then said, but here's another use for it.

2 So --

3 THE COURT: It's entirely possible that they  
4 could be lying? Your position really is, they're lying,  
5 and, but you didn't find that they were lying. If you  
6 had, maybe I would be inclined to give you some for  
7 deference. But you didn't say, I'm sorry, you just are  
8 wrong, you're not intending to market this as a muzzle  
9 brake. You're intending to market it as a silencer.  
10 We're calling you out on it. We don't believe you  
11 because the evidence doesn't support a belief in the  
12 truth of what you're saying. If you had said that, I  
13 would be inclined to defer to you, but you didn't say  
14 that.

15 MR. RYAN: Well, one example of that, your  
16 Honor, is the fact that in the administrative record,  
17 page nine, when they actually sent this item it had, for  
18 example, the same number on it. We called that out in  
19 the classification letter saying what you've done here  
20 is just made a silencer and you're trying to pass it off  
21 --

22 THE COURT: What do you mean the same number?

23 MR. RYAN: For example, in this, these two  
24 samples that were sent to the firearms and ammunition  
25 technology branch, they have a part number on them, and

1 they are identical part numbers, because this was simply  
2 taken off the shelf, one was called a silencer, one was  
3 called a muzzle brake, and they were sent to ATF. That  
4 is in the classification letter.

5 THE COURT: Right, but you don't conclude --  
6 see, one thing you could say here, you could have said  
7 is exactly that, this is not intended to function as a  
8 muzzle brake. It's intended to function as a silencer,  
9 and I know you claim otherwise, but we don't believe  
10 you, and here's the evidence to support our conclusion  
11 that you are wrong about this, either mistaken or lying  
12 or whatever. You're trying to -- you're intending this  
13 to be sold as a silencer. And that would be a piece of  
14 evidence that you would want to point to.

15 But you agree, that's not what you did. You  
16 did not in any way say to them, we find that you are not  
17 intending to market this as a muzzle brake. What you  
18 said to them was intent is relevant, but what's relevant  
19 is objective intent. And that argument is a legitimate  
20 argument that we can talk about, but it doesn't address  
21 this other problem, which is only means only, and it's  
22 not enough for you to say it's intended to be sold as a  
23 silencer. You have to show it's intended -- it should  
24 be used only as a silencer.

25 Now, your point that that third provision

1 would become completely unenforceable I think is wrong,  
2 because you could have a silencer kit that requires a  
3 certain kind of pin to make it finally effective, sell  
4 the assembly without the pin, and have another company  
5 sell the pin. The pin has no other use other than to  
6 fit within that kit. And the person selling that pin  
7 would be selling a silencer under the third definition.  
8 The person selling the kit would be selling a silencer  
9 under the second part of the definition, even if I'm  
10 right in saying only means only.

11           But I guess I want to ask you this. If only  
12 doesn't mean only, what does it mean.

13           MR. RYAN: The problem is, what ATF pointed  
14 out was that what the plaintiff had done in this case  
15 was simply create a silencer and are now trying to pass  
16 it off as something else.

17           THE COURT: I know you keep saying that and I  
18 understand you don't -- I'm saying let's assume you're  
19 right about that. I may not like it, you may not like  
20 it, but I can't stop them from doing what is lawful.  
21 And the statute tells us what's lawful and what's not.  
22 And just because they want to do something that you  
23 don't like and even if I didn't like it, I can't stop  
24 them. So you have to tell me how I can interpret that  
25 third provision in a way that makes sense and gets you

1 to the result that you want to get to. So I'm giving  
2 you that chance now.

3 MR. RYAN: All right, sir. What we look at,  
4 and I would suggest that the Court consider doing it  
5 like ATF does it, they get the item in. They know what  
6 this thing is or they don't know what it is. ATF went  
7 through --

8 THE COURT: That's what you did in the Bates  
9 case and that's what you did here, but the problem is  
10 you have a statute that you have to follow.

11 MR. RYAN: Yes, sir.

12 THE COURT: I know you want to do it a  
13 different way, but you've got to get Congress to amend  
14 the statute to do it the way you want, or you have to  
15 come up with a plausible interpretation of the statute  
16 that allows you to do what you want. And what I'm  
17 asking you now is not what you do, because I understand.  
18 You look at it and say, does this look like a silencer  
19 to us? Yeah, it does. Okay, it's a silencer. And it's  
20 a little more refined than that, but that's what you do.  
21 I understand that. There may be good reasons to do that  
22 from a policy perspective. But that's not what the  
23 statute envisions. The statute requires if you rely on  
24 that third prong, that you do more than that. You say I  
25 understand. I look at it. This looks like a silencer.

1 If it looks like a silencer, it is a silencer because  
2 it's objectively intended to be used as a silencer and  
3 that's all we need to establish.

4           If you're proceeding under the second prong of  
5 the statute, you may be right about that, but you're  
6 proceeding only under the third prong which has an  
7 additional limitation, which is it has to be intended  
8 only for that. So, if it's intended for something else,  
9 it's lawful. That's how I interpret the statute. If  
10 I've got that wrong, tell me how I should be  
11 interpreting it differently because that's going to be a  
12 problem. I didn't see you even arguing for a different  
13 interpretation of the statute on that point than the one  
14 I'm giving to you now. Are you?

15           MR. RYAN: Sir, I think the argument is that  
16 when you look at what intended only, all right, that has  
17 to be the objective, and that's where we get into the  
18 objective. If somebody merely says, I intend this item,  
19 I don't intend it to be a silencer, I intend it to be a  
20 doorstop, which is an example that we used, ATF as the  
21 administrative agency isn't arbitrary and capricious  
22 when they look at the facts, look at similar items, test  
23 similar items --

24           THE COURT: Then they need to say to the  
25 person, Sturm Ruger, you're trying to market a silencer

1 as a doorstop, okay, it's not a doorstop, it's a  
2 silencer. We don't believe you. That's what you need  
3 -- I know it's uncomfortable to say that, but I say that  
4 to people all the time. They get up and say things to  
5 me and I just say, sorry, you're not telling me the  
6 truth. And that's what you have to do. You can say to  
7 Sig Sauer, you're lying. If they tried to market a  
8 silencer as a doorstop, you could say to them, you're  
9 lying, you're not intending to market this as a  
10 doorstop, and I can tell you why you're lying. The  
11 following circumstances lead me to conclude that you're  
12 lying. One, this doesn't function as a doorstop; two,  
13 it costs several hundred dollars to manufacture and a  
14 doorstop can be manufactured for five bucks; there's no  
15 viable market for the use of this as a doorstop, but it  
16 does function as a darn good silencer, which is the  
17 field you're engaged in, and you could say to them on  
18 the basis of that this is not a doorstop. It's a  
19 silencer. And you're intending to use it as a silencer.  
20 And you're intending it only to be used as a silencer.  
21 And if you said that, any court would have to defer to  
22 your expertise if you were at all -- if it was all  
23 supportable by the evidence.

24 But that's not what you chose to do. You  
25 chose to treat this as if -- we're not saying you're not

1 telling us the truth. You didn't in any way engage with  
2 them on what their subjective intent was, because you  
3 said your subjective intent is irrelevant. Your  
4 subjective intent, no matter how clear your subjective  
5 intent is, does not allow you to avoid this regulation,  
6 because if it's objectively intended to be used as a  
7 silencer, regardless of what your subjective intent is,  
8 it's a silencer. Isn't that your position?

9 MR. RYAN: That the objective is the vital  
10 part, sir, yes, absolutely is important.

11 THE COURT: I mean, if we had him under a  
12 truth serum, the president of Sturm Ruger, and he said  
13 it's intended to be used as a muzzle brake, and you did  
14 extensive discovery of all of their records and their  
15 emails and everything, you had the design parts and  
16 memos of all the meetings over the course of several  
17 years, and every single fact pointed to the fact that  
18 this company wanted to market this only as a muzzle  
19 brake, you would still conclude, if you believed it  
20 functioned as a silencer, that it is intended to be  
21 marketed as a silencer because objectively a reasonable  
22 person would know that it would be used as a silencer.

23 Isn't that the position you take, the ATF  
24 takes?

25 MR. RYAN: I think I understand that, sir. I

1 think that in the Crooker case they actually talked  
2 about what would happen when -- for example, in that  
3 case it was a homemade silencer. What they later on  
4 said was that if there's a commercially designed  
5 silencer, you wouldn't have to show all these other  
6 things about what its intended use or not, because  
7 people know it's commercial and that's what it is, all  
8 right, that's what it is.

9 THE COURT: You're trying to argue the same  
10 standard that you argued in Crooker essentially, because  
11 if it functions as a silencer, it's objectively intended  
12 to be a silencer. I thought that's what you're saying,  
13 isn't it? If it functions as a silencer, it's  
14 objectively intended to be a silencer, because people  
15 are deemed to know that which follows inevitably from  
16 their actions, that's the case. Have you looked at any  
17 case -- we're now straying into the other issue. Let's  
18 get back to the one that matters here now.

19 I am asking you right now, tell me what the  
20 third, how the third prong of the statute, statutory  
21 definition of silencer, applies in a case in which a  
22 manufacturer produces a part that can be used both for a  
23 silencer and for a muzzle brake if the evidence supports  
24 the view that the manufacturer intended it to be used as  
25 a muzzle brake. How does that fit under the third prong

1 of that statute?

2 MR. RYAN: If the evidence supports the view,  
3 sir, that's not this case.

4 THE COURT: Well, I'm trying to simplify it to  
5 get an answer out of you, so that's why I'm asking the  
6 hypothetical. So follow with me, okay?

7 MR. RYAN: Yes, sir.

8 THE COURT: The evidence in the case is  
9 absolutely clear that the manufacturer intends this to  
10 be used and marketed in two ways. One, as a muzzle  
11 brake if sold alone and operated without the benefit of  
12 the cover. And two, as a silencer for people that want  
13 to put a cover on it. Okay? Let's just say they intend  
14 to do it that way. Let's assume the muzzle brake is a  
15 part and not an assembly, okay? And we're only  
16 construing the third part of that statute, okay? Now,  
17 let's assume that you have evidence that the  
18 manufacturer is intending to do both of those things,  
19 okay? Let's assume you do testing and the testing shows  
20 it can do both of those things, okay? Is that a part  
21 intended only for use in an assembly or fabrication of a  
22 silencer?

23 MR. RYAN: No, your Honor.

24 THE COURT: Okay. How is this case different  
25 from that?

1                   MR. RYAN: Because what the plaintiff cited  
2 and what they used as evidence that it could be used as  
3 something else, is merely an inherent function of  
4 silencers. So, for example, when they say it reduces  
5 recoil, that's because there's a big weight on the end  
6 of the firearm. Any weight will do that, all right.  
7 And when it redirects gases, that's inherently a  
8 function of monolithic cores.

9                   THE COURT: Do you concede in this case that  
10 the part at issue here will function as a muzzle brake?

11                  MR. RYAN: I don't know what function as a  
12 muzzle brake means in this context, sir, because there's  
13 a certain overlap between --

14                  THE COURT: How do muzzle brakes function?

15                  MR. RYAN: All right, muzzle brakes function,  
16 your Honor, by at the end of the firearm, redirecting  
17 the propellant gasses to counter recoil.

18                  THE COURT: So does this device, this part,  
19 function as a muzzle brake as you've just defined it?

20                  MR. RYAN: It's heavy, your Honor. I don't  
21 know that what it does is actually redirects the gasses  
22 to --

23                  THE COURT: Let me ask you more specifically.  
24 Is there anywhere in your decision documents in which  
25 the ATF explains that this is a silencer because it does

1 not function as a muzzle brake?

2 MR. RYAN: Anywhere that it -- I'm sorry,  
3 could you say that again, sir.

4 THE COURT: They asked for classification.  
5 You've responded; right?

6 MR. RYAN: Yes, sir.

7 THE COURT: Does your initial response say in  
8 any way that this part is a silencer because it does not  
9 function as a muzzle brake?

10 MR. RYAN: No, your Honor.

11 THE COURT: Does any of your subsequent  
12 responses to their request for reconsideration say, in  
13 any way, that this -- that this part does not function  
14 as a muzzle brake?

15 MR. RYAN: No, your Honor.

16 THE COURT: All right. So, there's no  
17 evidence -- there's no evidence, or at least you did not  
18 explain your decision in any way, by concluding that  
19 this did not function as a muzzle brake. Do you agree?

20 MR. RYAN: Only that all of these items  
21 function as muzzle brakes. Silencers function as muzzle  
22 brakes.

23 THE COURT: So your theory is that every part  
24 -- that every part like this will function as a muzzle  
25 brake, and every part like this is a necessary component

1 of a silencer?

2 MR. RYAN: That's right, as designed by the  
3 companies themselves, sir, yes.

4 THE COURT: And for that reason it is  
5 necessarily the case that this is intended only for use  
6 in the assembly of a silencer?

7 MR. RYAN: Because that's what it really is,  
8 yes, sir. Yes, sir.

9 THE COURT: Okay. I've got to tell you, I  
10 have a real problem with that position here. I  
11 understand your concern, and believe me, I'm concerned  
12 about the unregistered, unregulated sales of silencers,  
13 but I have to uphold the law, and I have to interpret  
14 the statute the way -- I mean, I don't see -- your other  
15 argument is that it involves some statutory  
16 interpretation. I can't discern the principal of  
17 interpretation that you're using in presenting the  
18 argument that you're presenting to me now.

19 What does only mean?

20 MR. RYAN: We agree, sir, I think we're more  
21 on the same page than it appears. Only does mean as you  
22 described it. The problem in this case is ATF can't  
23 just look at what a person or a company says and sends  
24 in. It must look at the known universe, all these  
25 things, in fact run --

1                   THE COURT: You should explain why it doesn't  
2 function as a muzzle brake or isn't intended to be sold  
3 as a muzzle brake. Why are you concluding that this is  
4 not intended to be, intended for use in the assembly of  
5 a muzzle brake? Why are you concluding that this part  
6 is not intended for use in the assembly of a muzzle  
7 brake?

8                   MR. RYAN: For example, all of the -- all of  
9 the characteristics of the item. For example, your  
10 Honor, the shoulder, the screw on the end of it, all of  
11 these things are unnecessary. What it really is and  
12 what ATF did was looked at the item and said we  
13 understand the argument, but what they've really done  
14 here is taken a silencer and trying to give it another  
15 name. And it wasn't arbitrary and capricious for ATF to  
16 say that. It actually went in and tested like items and  
17 actual muzzle brakes.

18                  THE COURT: I wish you had said that, it would  
19 be an easier case. If you said to them, you know,  
20 you're lying, it's not intended to be used as a muzzle  
21 brake, it would be an easier case, because then the sole  
22 issue would be was your factual conclusion arbitrary and  
23 capricious. But, you never even addressed their  
24 argument that it -- they concede it's a dual use item, I  
25 think, they concede that with an additional part it

1 could be a silencer. So it has potentially a dual use.  
2 But they have consistently maintained they're intending  
3 subjectively to market it as a muzzle brake, and they  
4 have consistently maintained that it functions as a  
5 muzzle brake, and they have consistently maintained that  
6 even if you think it can be adapted to be used as a  
7 silencer, it can be and is being intended to be sold as  
8 a muzzle brake. And under the statute, it's entitled to  
9 be treated as a muzzle brake under that circumstance if  
10 it's a part rather than an assembly. That's I think  
11 their position, and I don't think you ever responded to  
12 that argument.

13 MR. RYAN: Well, your Honor, it's true that  
14 ATF never said you're lying. They didn't say that.  
15 However, ATF did provide, for example, on page 14 of the  
16 original or the final classification, an example of the  
17 blast that comes out when this thing is fired and where  
18 the hand would have to be held, and it shows that the  
19 blast would cover the hand. It would be completely  
20 worthless to use it like that.

21 It also points out the same numbers. What  
22 you've done is you've just taken this off the shelf,  
23 it's the same number, took a picture of them together to  
24 show they are exactly the same. All right? ATF never  
25 said yes --

1                   THE COURT: Can you just explain this exhibit.  
2 One is a silencer without the cover on it, is that what  
3 you're telling me?

4                   MR. RYAN: In this case it's part of the  
5 administrative record, page number nine. It's a  
6 side-by-side comparison of the Sig machine gun up here  
7 and the submitted sample in question in this case.

8                   This comes with as the outer tube here that  
9 screws on with this nut. This came just like this, your  
10 Honor.

11                  THE COURT: But are they telling you, is  
12 everybody in agreement that the top is a silencer, the  
13 top weapon there has a silencer on it?

14                  MR. RYAN: As it's sold, yes, that's certainly  
15 ATF's position.

16                  THE COURT: All right. And the only  
17 difference between the two is that what they're selling  
18 is a muzzle brake, the interior internal component of  
19 the silencer that they are also selling.

20                  MR. RYAN: That's right, your Honor.

21                  THE COURT: Do you agree on that?

22                  MR. HALBROOK: That the parts are the same,  
23 yes, your Honor.

24                  THE COURT: So you've basically taken the cap  
25 off your silencer, you welded it into the gun, and

1 you're just going to sell it as a muzzle brake. You  
2 agree with that?

3 MR. HALBROOK: We agree with that, yes, your  
4 Honor.

5 THE COURT: Okay. So, I understand the  
6 problem from your perspective. And their answer to that  
7 is regulate the people selling the sleeve, because the  
8 sleeve doesn't have any use other than to make it a  
9 muzzle brake into a silencer.

10 Believe me, it looks like a loophole. I  
11 understand all those concerns, but again, the law is the  
12 law.

13 MR. RYAN: Yes, sir, but when Congress changed  
14 that law in 1986, as you point out before, it wanted to  
15 catch this type of thing where someone could actually  
16 create a silencer part, spread them around, and you  
17 would never be able to touch it because all you have to  
18 do was have it -- so, what this does is it renders that  
19 part of the law useless because now --

20 THE COURT: That is where you're completely  
21 wrong because what Congress in fact did was they're  
22 concerned about kits, and they used a two-pronged  
23 approach to kits and they said anybody selling an  
24 assembly to be used as a silencer, we got them, it's a  
25 silencer, okay, even if it doesn't have the last part,

1 it's a silencer. So, if they leave out four parts, it's  
2 an assembly of parts intended to be used as a silencer.  
3 Even if it also functions as a muzzle brake, too bad,  
4 it's intended to be used as a silencer and they're done.  
5 And then they say, well, what about those people selling  
6 the part, like the sleeve here, okay. They say, well,  
7 we have a concern. The concern is we don't want to ban  
8 the sale of all screws simply because someone might put  
9 a screw in and it would complete the silencer, so we  
10 have to be a little more careful with part than we do  
11 with assembly, and so we came up with this language  
12 only. And I think that's what Congress was doing. That  
13 seems to be what's objectively manifest in the language  
14 they chose. Why didn't they just say any assembly or  
15 part intended for use in a silencer? They didn't do  
16 that, because if they did, if they just collapsed two  
17 and three together, why wouldn't they do that? Do you  
18 have an argument?

19 MR. RYAN: I can't --

20 THE COURT: Okay, I think the logical reason  
21 why they would do it is because they are concerned that  
22 parts may have multiple uses, and we don't want to ban  
23 the sale of parts that have multiple uses. Kits,  
24 assemblies, even if they do have multiple uses, if  
25 they're intended to be used as a silencer, we want to

1 ban them. I think that's what they are saying. And  
2 what these guys have done is they're taken something  
3 that you're prepared to treat as a part and they're  
4 going to slide in under the part exception, because it  
5 functions as a muzzle brake. You want to stop them. I  
6 understand why you want to stop them. But you can't  
7 stop them unless you do it by law, so, and the problem  
8 with only is you need to then engage with them on the  
9 only argument. So you have to then, in order for your  
10 decision not to be arbitrary and capricious, you can't  
11 just ignore their argument. You can't just pretend it  
12 doesn't exist and in your answer explain to them why  
13 it's a silencer. I can't find any point in there in  
14 which you ever explain to them that this is why it's  
15 intended only to be used as a muzzle brake, even though  
16 you claim otherwise, and even though you submitted  
17 evidence that it functions as a muzzle brake.

18 I understand your point. Your point is that  
19 every silencer will function as a muzzle brake,  
20 therefore, this loophole will allow anybody who has a  
21 part, that has this essential component of a silencer in  
22 it, will be able to claim it's a muzzle brake. I  
23 understand the problem, but I don't see how it fits  
24 within the statute.

25 MR. RYAN: But, your Honor, the point I was

1 trying to make is just that when an agency isn't allowed  
2 to look behind and look at what it actually is, what  
3 that allows is a company to go ahead and say, okay, that  
4 little screw, it's now used for doorknobs, and so now  
5 it's not part-intended only. And in that way you get  
6 around the statute. Congress couldn't have meant for  
7 someone just to come up with some fanciful use for an  
8 item.

9 THE COURT: Please understand me, I completely  
10 agree with you that the ATF doesn't have to take the  
11 manufacturer's explanation for what it wants to do. I  
12 absolutely agree that the ATF has a duty to look behind  
13 the manufacturer's explanation for what it does. It  
14 would be ridiculous to assume otherwise. So I am not in  
15 any way suggesting to you that the ATF is to simply  
16 accept Sig Sauer's explanation. And I have no problem  
17 with you if they submitted this classification letter  
18 and said, I'm sorry, this looks a lot like a silencer to  
19 us, we need all your engineers here for depositions, we  
20 need to see all your internal email, we have great  
21 suspicions about this and we're simply not willing to  
22 give you a letter approving this without conducting a  
23 detailed investigation because this looks to us like a  
24 silencer, and we have serious doubts about whether in  
25 fact you're going to market this as a -- I would have no

1 trouble with you doing that. In my view it's entirely  
2 appropriate for you to do that when you suspect that a  
3 manufacturer is seeking to exploit a loophole.

4 So I'm not, do not put me in the box of saying  
5 he won't let us look behind the manufacturer's  
6 explanation. I think you have a duty to look behind the  
7 manufacturer's explanation. The problem is you never  
8 even commented on their argument, the one I'm dealing  
9 with now. You never in your decisions ever commented  
10 and explained why, although this functions as a muzzle  
11 brake and although you say you're going to sell it as a  
12 muzzle brake, we think it is not intended to function  
13 only as a muzzle brake. One answer would be we don't  
14 believe you, here's why. And I outlined many ways you  
15 could do that. You could go and get depositions from  
16 them, get them to tell you, you can look at all their  
17 internal emails and their design documents, and you  
18 could reach a conclusion, no, the evidence doesn't  
19 support you on that, or you could look at the entire  
20 market for muzzle brakes and say this is simply not an  
21 economically viable product as a muzzle brake and as a  
22 result, because it's clearly usable as a silencer, we  
23 think this is what it's used for and it's not used for a  
24 muzzle brake, because to be useable as a muzzle brake it  
25 has to in some sense be commercially viable, and it's

1 only viable as a silencer, and what you're doing is  
2 trying to develop market share for people that are going  
3 to manufacture their own cover for this and use it as a  
4 silencer.

5 If you'd said that and there was evidence to  
6 support it, you'd be fine. So I don't accept the label  
7 that my theory is that you shouldn't look behind what  
8 the manufacturer is saying.

9 MR. RYAN: And I wasn't trying to suggest  
10 that, sir. It's the government's position that, as you  
11 point out, we must look behind it. And I would point to  
12 ATF's letter, page 15, the second paragraph, it says  
13 therefore although Sig claims that its submission is a  
14 muzzle brake, it is clearly a device that is well-known  
15 in the firearm's community as a monolithic baffle core  
16 and therefore a firearm silencer.

17 What ATF used to do that was all the testing.

18 THE COURT: I agree. They don't even disagree  
19 with you on that point here today.

20 MR. RYAN: Right.

21 THE COURT: That isn't the issue. The issue  
22 is that it doesn't function as a muzzle brake. It's  
23 saying to me, ATF looked behind and we concluded that  
24 this was a silencer component, yeah, they agree it's a  
25 silencer component. They agree it's the same thing they

1 use in their silencers, but that doesn't answer the  
2 question.

3 I guess -- I don't know that we can be  
4 productively going back and forth on this anymore. If  
5 there is anything more you want to say on the subject,  
6 I'll be happy to hear it on this particular issue.

7 MR. RYAN: Just the one thing, sir, and I will  
8 leave it at that. What ATF was trying to say in the  
9 letter was all of these things that you've provided, the  
10 same number, the identical thing, the fact that your  
11 sample won't work without burning someone's hand, the  
12 fact even that silencers as a natural function will  
13 reduce recoil and not silence when it's apart, all  
14 right, all of these things show that what you've told us  
15 is different than what this thing actually is, and  
16 that's the way ATF was going.

17 THE COURT: And all of that would fit under  
18 the second prong of the test if you accept objective  
19 intent as the appropriate standard.

20 MR. RYAN: But also the third, the agency is  
21 allowed to look behind. And that's what the agency was  
22 --

23 THE COURT: We're just talking past each other  
24 on that point again. We will just have to agree to  
25 disagree. I may be misunderstanding things, but I just

1 don't see your answer as responsive to the concern that  
2 I'm presenting here.

3 MR. RYAN: If I can try one more because it's  
4 important, sir.

5 THE COURT: Yes.

6 MR. RYAN: There was a -- the problem is,  
7 obviously, as I understand your position, only is out  
8 there and if they're pointing out that, hey, there's  
9 some other function for this, then it can't be only,  
10 and I understand --

11 THE COURT: No, no, no, I don't say that. I  
12 want to be clear. It has to be intended only for use as  
13 a silencer. So, if the person says I'm going to use it  
14 for something else, for example, if we have two guys,  
15 two drug cartel members getting together in a room and  
16 they're saying I want to use this as a silencer and  
17 nothing else, and he puts it on the gun, the fact that  
18 you could take the gun apart and use some component of  
19 it as a muzzle brake doesn't provide a defense to the  
20 criminal statute, because they're intending only to use  
21 it as a muzzle brake -- as a silencer, excuse me. What  
22 I'm talking about is this context. If they intend to  
23 use it for a different purpose, and if they objectively  
24 intend to use it for a different purpose, it can't be  
25 intended to be used only as a silencer. That seems to

1 me -- I mean, it's a very simple grammatical  
2 proposition. I don't know why you're having such  
3 trouble with it.

4 MR. RYAN: And I think, your Honor, because  
5 what it suggests is that ATF somehow didn't take that  
6 into consideration. It did. It looked at what they  
7 said and all of the evidence that they showed for it.  
8 But all of the evidence that they showed for it was  
9 simply what you would expect of a silencer. And so ATF  
10 looked at that and said, yeah, we understand what the  
11 plaintiff was trying to do here, but all the evidence  
12 that they looked at, including the fact that it wouldn't  
13 burn the hand and all the other things, means that that  
14 isn't really what they were trying to do.

15 THE COURT: Okay. We've got to take a break.  
16 What I think what I'll do is I'll let you respond to  
17 what he said about this argument about only, and then  
18 I'll come back and I'll talk to you about the second  
19 issue I have with your case, which, and I think you and  
20 I agree on this, that you interpret the word intended in  
21 the statute, you agree that intention is required in  
22 order for something to be a silencer?

23 MR. RYAN: Yes, sir.

24 THE COURT: Okay. But where you disagree with  
25 them is that they say subjective intention is required,

1 and you say objective intention is sufficient; right?

2 MR. RYAN: I believe so.

3 THE COURT: And that's a statutory  
4 interpretation question, and that's where we get into  
5 what level of deference is to be accorded to your  
6 interpretation on that. And I want to engage with you  
7 both about that particular issue, because that issue, if  
8 they're right on that issue, whether you tried to do  
9 this under the second prong of the statute or the third,  
10 if the evidence supported a judgment that this was  
11 objectively intended, they lose. Okay? So that, and  
12 their argument is he's wrong about this. It's not  
13 objective intent, it's subjective intent, that's what  
14 the First Circuit held when it construed this statute.  
15 You shouldn't give deference to the ATF's  
16 interpretation. If anything, you should apply the rule  
17 of lenity and interpret the statute the same way the  
18 First Circuit did, and therefore we should win because  
19 the ATF never concluded we did not subjectively intend.  
20 All they concluded is we objectively intended, and  
21 that's based on an incorrect ruling of law, and  
22 therefore the decision can't stand. That's the argument  
23 I want to engage -- first, when we come back, I want to  
24 ask you to engage with me on this third prong argument,  
25 and then I'm going to turn back to you and say please

1 engage with me on this objective intent argument, and  
2 look for their response.

3           Those are what I see as the two issues in the  
4 case. I don't see Sturm Ruger as having any other  
5 significant argument here. I see their arguments to be  
6 this was arbitrary and capricious and not in accordance  
7 with law for two reasons. First, they concluded that  
8 this was a part and not an assembly, and they acted  
9 arbitrarily in concluding that it can be only -- it's  
10 intended only for use in assembling a silencer. And  
11 second, their argument is, to the extent they say this  
12 is intended for use as a silencer, the ATF is wrong  
13 because their judgment is based on incorrect  
14 interpretations of the statute. It requires subjective  
15 intent. There's no evidence of subjective intent here.  
16 Because there's no evidence of subjective intent, the  
17 ATF based its decision on an incorrect interpretation of  
18 law and therefore the decision has to be invalidated  
19 under 706. Those are what I see as your two arguments.

20           Do you have anything else to tell me other  
21 than those two things?

22           MR. HALBROOK: Your Honor, that's basically  
23 it, yes, sir.

24           THE COURT: Okay. So, when we come back,  
25 then, I'll hear from you on the second argument, then

1 we'll come back to the objective intent, hear from you,  
2 hear from them, and then we'll be done, okay?

3 MR. RYAN: Yes, sir.

4 (Recess taken.)

5 THE COURT: I apologize. I referred to Sig  
6 Sauer as Sturm Ruger. Sturm Ruger is the only New  
7 Hampshire -- I didn't know that Sig Sauer was a New  
8 Hampshire company. Where are you based?

9 MR. SHAWVER: In Newington, sir.

10 THE COURT: Oh, okay. And I thought it was  
11 like a German company or something. It's a local New  
12 Hampshire --

13 MR. SHAWVER: It was founded in Germany. Most  
14 of the manufacturing happens here in the U.S.

15 THE COURT: But it's a German company, isn't  
16 it?

17 MR. SHAWVER: Yes.

18 THE COURT: Oh, okay.

19 MR. HALBROOK: Sig is a Swiss company and  
20 Sauer was the German company.

21 THE COURT: Okay, yeah, all right. I keep  
22 thinking Sturm Ruger because I've had Sturm Ruger cases  
23 and it used to be the only real New Hampshire gun  
24 manufacturer, the one that everybody talked about, so.  
25 Okay, thanks. Yes.

1                   MR. RYAN: Your Honor, could I just add one  
2 thing for just a moment?

3                   THE COURT: Yes.

4                   MR. RYAN: You stated, and my colleague  
5 brought up to me, that the second portion of the  
6 definition, the second clause dealt with completed kits,  
7 and that --

8                   THE COURT: No, it doesn't, absolutely  
9 doesn't. Deals with a, if you -- I wish you had relied  
10 on that provision more expressly, and that's why I asked  
11 you about that because I agree that if you produced a  
12 kit that in combination with other parts can be used to  
13 make a silencer, and you're intending the kit for use as  
14 a silencer, that is a violation, that is a kit that  
15 requires NFA compliance.

16                  MR. RYAN: And that was my fault, your Honor.  
17 I misunderstood. I thought you were referring to the  
18 second portion as the kit example. And so I would just  
19 point out --

20                  THE COURT: Well, I'm sorry, I am referring to  
21 the second portion as a kit.

22                  MR. RYAN: So, as a complete kit, though.

23                  THE COURT: No, not a complete kit. That's  
24 exactly what Congress was concerned about, is people  
25 gaming the system by selling a conversion kit that was

1 missing one part.

2 MR. RYAN: That's right.

3 THE COURT: And a conversion kit that's  
4 missing one part, two parts, three parts, if you sell  
5 more than one part together that's -- that's assemblable  
6 in conjunction with other parts that's intended for use  
7 as a silencer, you are subject to regulation under the  
8 second part.

9 MR. RYAN: That's right, your Honor. And  
10 again, I apologize for that. I would point to our  
11 letter, page five, the silencer parts category -- or  
12 subheader. It actually says, as stated, Sig's  
13 submission is a monolithic baffle core which when  
14 combined with an outer tube are parts designed,  
15 redesigned and intended for use in assembling or  
16 fabricating a firearm.

17 THE COURT: That's in your final response. It  
18 isn't in your first letter, your second letter, it's in  
19 your final response after the lawsuit was brought, and  
20 you don't in any way explain why it is under that  
21 provision. All of your reasoning and all of your  
22 letters focus on part, and that's why I think you  
23 appropriately conceded when I asked you that you were  
24 proceeding only under the third part and not the second  
25 part. I recognize your last letter has a reference to

1 the second component, but it's not the basis of your  
2 decision. That's not how I construe it. If it were, if  
3 you had written it differently, I think we'd have a very  
4 different kind of case. So, the third problem would  
5 have gone away. We would then have a debate about  
6 whether this is a part or an assembly of parts. You  
7 probably don't want to get into that argument because  
8 this looks like an extrusion of metal that's only a  
9 single part.

10 Now, you might have available an argument to  
11 you that wasn't raised at all that this is an assembly  
12 of parts when you permanently affix that extrusion to a  
13 weapon, and that makes the weapon with the part on it an  
14 assembly of parts regulable under the second part.

15 You might have made that argument, but you did  
16 not make that, there is not one hint in the proceedings  
17 that that's what you were thinking. You have not  
18 presented that argument here today. If you were to lose  
19 here, I would probably remand the case to you and you  
20 would have to think about how you want to deal with it,  
21 but certainly it would be an argument that you could  
22 make but did not make, that what is being shown here in  
23 the request for confirmation is, involves more than one  
24 part. It involves gun parts and this extrusion of metal  
25 permanently affixed to it.

1                   MR. RYAN: No, your Honor, and you are correct  
2 that ATF did not consider the firearm with the  
3 permanently attached as a combination of parts. What  
4 that section refers to is the combination of parts being  
5 the baffle stack.

6                   THE COURT: Is that baffle stack more than one  
7 piece of metal?

8                   MR. RYAN: It's a single piece of metal, sir

9 --

10                  THE COURT: How do I -- now, you never made  
11 this argument in your materials, so I don't think you  
12 can make it now, but to the extent you're trying to make  
13 it now, how would that be seen as parts plural?

14                  MR. RYAN: The parts, your Honor, are the core  
15 along with the tube and the screw. As we pointed out --

16                  THE COURT: All right, that's another argument  
17 you could have made but didn't make, which is this is a  
18 part and it is an assembly of parts when you put the  
19 other parts together. But the problem with that  
20 argument is a logical problem. What is the third  
21 provision designed to address if not exactly that  
22 circumstance?

23                  So you see what I'm saying to you is, if you  
24 wanted to make an argument about assembly of parts, you  
25 might have been able to make one, but it's a very

1 difficult argument to make. You didn't make it at all  
2 in your materials.

3 MR. RYAN: That's the argument that's made on  
4 page five.

5 THE COURT: Tell me how you've made it. Tell  
6 me how you've explained how the baffle is parts.

7 MR. RYAN: Not that the baffle is parts.

8 THE COURT: They're not assembling it with a  
9 cover or anything else. And your argument is, your  
10 argument is two means that, then two completely subsumes  
11 three.

12 MR. RYAN: No, your Honor, it's just the  
13 example that they gave in the legislative history from  
14 the police chiefs and ATF.

15 THE COURT: Of course they did, but tell me  
16 how -- you're making the argument now for the first time  
17 in court rather than in your documents, and despite the  
18 fact that you conceded to me earlier in the argument  
19 that you're only proceeding under the third prong, so  
20 let's assume you can get out from the fact that you  
21 conceded to me at the beginning that you were not  
22 proceeding under the third prong, let's see if you can  
23 get out from the fact that you never in any way  
24 explained any theory of how it is a silencer under the  
25 second prong. And let's say you're going to make your

1 argument now, okay. How do you make an argument that  
2 this is an assembly of parts under the second prong that  
3 does not completely subsume within it the third prong?

4 MR. RYAN: In that it's the three separate  
5 parts that you would go around to the table at the gun  
6 show and get. Just because this person doesn't have a  
7 -- they don't give it to you at the same time --

8 THE COURT: So that every sale of one part  
9 that's going to be used in a silencer, is an assembly of  
10 parts because you could combine it with other parts to  
11 make a silencer. That's what you're saying?

12 MR. RYAN: No, your Honor.

13 THE COURT: Well, then, how are you -- your  
14 argument is making no sense.

15 MR. RYAN: In this case what you get is  
16 something that is permanently attached to a firearm that  
17 you later get the other parts for that now go on and  
18 make the complete combination of parts or complete  
19 device from those combination of parts.

20 THE COURT: I don't think that I can sustain  
21 an administrative adjustment under the APA based on a  
22 theory that was not articulated and considered by the  
23 decisionmaker.

24 If you have a trial, if I have a trial in my  
25 court and an appeal is taken and I make a ruling, the

1 Court of Appeals can sustain my decision on any basis,  
2 even if I don't cite the correct basis. But under the  
3 APA, part of the arbitrary and capricious standard is  
4 that you need to engage with and explain your decision.  
5 And you're now coming up, you're manufacturing a  
6 completely new argument that is nowhere, it's not even  
7 in your briefs today, not in any substantive way, or I  
8 certainly didn't get it if it was in there.

9 MR. RYAN: Sir, I would point to the briefs,  
10 the memorandum of law in support of the defendant's  
11 motion for summary judgment filed on January 9th. Page  
12 3, page 12 and page 22 we actually talked about when  
13 combined with an outer tube and end cap, are parts,  
14 designed or redesigned, and intended for use in  
15 assembling or fabricating a firearm silencer.

16 THE COURT: That says it's a part. It doesn't  
17 say that it's an assembly of parts. Show me where you  
18 said in your brief that it's an assembly of parts. This  
19 extrusion is an assembly of parts because it is one part  
20 but it can be combined with other parts to make a  
21 silencer. That's the argument you're presenting to me  
22 now. Show me where you made that in your brief.

23 MR. RYAN: The argument is not that, your  
24 Honor, I --

25 THE COURT: Well, what is your argument?

1 You're wasting my time here because you're just  
2 spinning, and I can't even get any purchase on what  
3 you're saying.

4 MR. RYAN: It's that they've simply broken  
5 down this one combination of parts. Sig has it. It's  
6 one design. It's not something that someone has to come  
7 up with --

8 THE COURT: But your argument is -- you're  
9 frustrating me now because you're just getting almost  
10 incoherent.

11 As I understand your argument, it is, judge,  
12 even if this extrusion is a single part, the sale of the  
13 extrusion is the sale of an assembly of parts under two,  
14 and the reason it is is because it can be combined with  
15 other parts to make a silencer.

16 Is that or is that not what you're saying?

17 MR. RYAN: No, your Honor.

18 THE COURT: Is the extrusion a part or is the  
19 extrusion parts, just the extrusion?

20 MR. RYAN: The core, sir, is that what you're  
21 talking about?

22 THE COURT: You give me the label that you're  
23 comfortable with, okay? What label are you comfortable  
24 with? Let's call it the core, all right?

25 MR. RYAN: Yes.

1                   THE COURT: Is the core a part or is it  
2 multiple parts?

3                   MR. RYAN: It's a part that is part of a  
4 combination of parts.

5                   THE COURT: Is it a part or multiple parts?

6                   MR. RYAN: It's a part, sir.

7                   THE COURT: Where are the other parts that  
8 they're trying to market and sell with this item? What  
9 other parts are they marketing and selling with this  
10 item that constitute a silencer?

11                  MR. RYAN: The screw at the end and the outer  
12 tube.

13                  THE COURT: Are they selling the screw at the  
14 end and the outer tube with this product?

15                  MR. RYAN: They have them available, sir, and  
16 so for example --

17                  THE COURT: Okay, I'm done with that. I don't  
18 want to hear anymore of that argument. You've made it.  
19 Just move on, okay?

20                  Look, you were doing so well the first part of  
21 your argument, then you just start making stuff up.  
22 That's not an acceptable approach. Okay?

23                  Counsel, here's the thing that they said that  
24 was most important to me. They base their only argument  
25 on evidence that suggests that if you try to operate

1 this weapon in the way that you sent it to them  
2 initially, you will burn your hand, because the gases  
3 will be directed back at your hand, so it can't be used  
4 in that way. Now your response to that is, that was  
5 just a mistake. We had a prototype handle. We put it  
6 on there just for purposes of getting it out the door.  
7 We're never going to sell it that way. And where we are  
8 going to put the handle, you won't get burned.

9                   Can you develop that argument a little bit  
10 further for me.

11                  MR. HALBROOK: Yes, your Honor. May I walk  
12 around here and hold the rifle and explain it?

13                  THE COURT: Whatever you need.

14                  MR. HALBROOK: Thank you. Because my response  
15 goes also to your question about subjective intent  
16 versus objective intent.

17                  This is the rifle, and the first prototype --

18                  THE COURT: You can come around if you want.

19                  MR. HALBROOK: Pardon?

20                  THE COURT: I'm telling your colleague here  
21 that he can come around and see what you're doing.

22                  MR. HALBROOK: This hand guard was longer than  
23 it would normally be because that's what they had  
24 available, and so the ATF's argument is that you  
25 wouldn't hold it there because you'd burn your hand.

1       But this is actually what we sent them the second time.  
2       Before they ever made that argument, we sent them the  
3       prototype with this hand guard, which is the correct  
4       one, and you would want to keep your hand back here  
5       because you would not hold it there.

6                  THE COURT: And you would not get burned from  
7       the gas back flow.

8                  MR. HALBROOK: No, no, your Honor.

9                  THE COURT: Do you disagree with that?

10                 MR. RYAN: That you would not get burned, sir?

11                 THE COURT: Right.

12                 MR. RYAN: How this -- no, your Honor. And  
13       the reason is, because it's so close to where you would  
14       hold it, in fact there's a part here that your hand  
15       would go up against, if it's going backwards as the  
16       sound tests show and to the side, you're still too close  
17       to it. The flash --

18                 THE COURT: Do your experts in the materials  
19       you sent to them in response to their, what he's  
20       suggesting is the reference that you quoted to me was  
21       based on the early prototype they sent you, and they  
22       sent you a refined prototype before you made that  
23       judgment, and your comments were related solely to the  
24       earlier prototype, not to the product they actually  
25       intend to market, is that your position?

1                   MR. HALBROOK: That your hand would not be  
2 burned by holding it here --

3                   THE COURT: I'm sorry that I'm so inarticulate  
4 that people can't understand me. I'll try to be clearer  
5 about it, okay?

6                   I thought your position to me is as follows.  
7 In response to their argument, judge, we sent them an  
8 initial prototype that had the hand guard farther out  
9 towards the end of the barrel of the weapon.

10                  MR. HALBROOK: Yes, your Honor, out here, yes.

11                  THE COURT: And before they got back to us  
12 with their express concern that people will be burned if  
13 they use the item as a muzzle brake without a cover over  
14 it --

15                  MR. HALBROOK: Yes, your Honor.

16                  THE COURT: -- we sent them a revised  
17 prototype that reflects the device we're actually going  
18 to market.

19                  MR. HALBROOK: Yes, your Honor.

20                  THE COURT: That's the device I now have in my  
21 hand.

22                  MR. HALBROOK: Yes, your Honor.

23                  THE COURT: And it is our testing and our view  
24 is, and we informed them, that you will not be burned  
25 when you operate the muzzle -- operate the weapon in

1 this way, because the handle is now correctly located  
2 and it's back from any outer gas flow.

3 MR. HALBROOK: That's correct, your Honor.

4 THE COURT: Okay. And that's what I was  
5 asking you. You've now given me the answer.

6 Now I'm going to turn to you and say, this is  
7 what he says, okay. Your people, what's in the  
8 administrative record is, the ATF said to them at some  
9 point, the example you submitted to us if used as a  
10 muzzle brake without a cover is going to cause the user  
11 to burn their hand. He says that was based on the first  
12 prototype, not the second.

13 Is that right or wrong?

14 MR. RYAN: Yes, the second prototype had the  
15 shorter muzzle brake -- sir, I'm sorry, shorter hand  
16 guard.

17 THE COURT: Answer my question. Was the  
18 comment that the agency made about burning the hand  
19 based on observation and testing of the initial  
20 prototype or the second?

21 MR. RYAN: The initial prototype.

22 THE COURT: Did they make that statement after  
23 they had in their possession the second prototype?  
24 That's what he says. I need to know whether it's true  
25 or not.

1                   MR. RYAN: It may be, your Honor. As far as  
2 the dates of when the firearm came in --

3                   THE COURT: So you will look at the  
4 administrative record, you believe there will be  
5 something in the administrative record that will tell us  
6 that this was in fact in the possession of the ATF, this  
7 current version at the time it made the decision?

8                   MR. HALBROOK: Your Honor, the administrative  
9 record reflects we sent them the sample with this short  
10 hand guard. They made that comment later in the letter  
11 we received on August 15 of 2014.

12                  THE COURT: Okay. You told them in your final  
13 response that you won't burn your hand on this because  
14 you've relocated the hand --

15                  MR. HALBROOK: Well, it was never an issue,  
16 your Honor, because they had never said that before. We  
17 simply sent them this --

18                  THE COURT: When they did make it an issue,  
19 you filed the last response I thought.

20                  MR. HALBROOK: Well, our response was to  
21 explain how we sent the first hand guard, which was  
22 longer, and we replaced it with the shorter one, and  
23 that's the one we will market, and they never said  
24 anything after that.

25                  THE COURT: That's what I'm trying to

1 establish.

2 MR. HALBROOK: Yes, your Honor.

3 THE COURT: You did send them a response that  
4 said, you said people will burn their hand. You base  
5 that conclusion on the first prototype.

6 MR. HALBROOK: Right.

7 THE COURT: The second prototype has the hand  
8 guard in a different spot. You will not be burned when  
9 using the prototype that we intend to market, and we did  
10 that just because we used the first, I'm getting all the  
11 terminology wrong but we all know what I mean, the first  
12 hand guard rather than the second.

13 MR. HALBROOK: That's a fair reading of what's  
14 in the administrative record, yes, your Honor.

15 THE COURT: So, I just want to know, is there  
16 anything in the administrative record that tells us  
17 whether a person operating the weapon they actually  
18 intend to market will burn their hand or not?

19 MR. RYAN: No, your Honor.

20 THE COURT: Okay. So I can't really, I mean,  
21 even if I'm going to base the decision on the  
22 administrative record, we don't have an answer to that  
23 question.

24 MR. RYAN: Only as to the later submission,  
25 sir, that's correct.

1                   THE COURT: We have them saying it doesn't.  
2 We don't have you saying it does.

3                   MR. RYAN: That's right as to the second.  
4 Only to the first, sir.

5                   THE COURT: Right, okay. All right, good.  
6 Thank you. So I assume, then, your response to this is  
7 this is a phony issue, judge, it's based on a  
8 preliminary assessment. If they were going to act in a  
9 non-arbitrary way, if this was something that would  
10 affect their decision, they were obligated to test it  
11 under the second weapon, which if they did would show  
12 you wouldn't have their hand burned, therefore this  
13 argument shouldn't be considered by you at all.

14                  MR. HALBROOK: We believe they were reaching  
15 in that argument. Their main argument was to call this  
16 by one name, the monolithic baffle core, and that was  
17 really the end issue for them, and that was kind of a  
18 throw-in argument at the end.

19                  THE COURT: In truth it is one item. It's the  
20 same part you use in the silencer you're using as a,  
21 want to market as a muzzle brake.

22                  MR. HALBROOK: And that brings up the  
23 subjective and objective intent that I would like to  
24 just go into very --

25                  THE COURT: Do you want to say anything about

1 the only argument because that's what I'd like to  
2 address now, and then I'll give you a chance to be heard  
3 on the subjective and objective issue.

4 MR. HALBROOK: Well, maybe by holding the  
5 rifle that helps us as well because it is an effective  
6 muzzle brake. And when you look at the video, I think  
7 it might be on your screen, on the left side you see  
8 where, you know, if you fire a gun it does have a muzzle  
9 brake, it goes up like that and it pushes back, and here  
10 it just comes back and you retain your target --

11 THE COURT: He concedes that it will reduce  
12 the brake in the muzzle, and nowhere in the record do  
13 they ever say it doesn't.

14 MR. HALBROOK: And that's why the word only  
15 doesn't apply, that this is intended only for use to  
16 fabricate a silencer, that's not correct. People can,  
17 if the Court agrees with us, people can buy this  
18 product. They may sell some covers that people who want  
19 to go through the process of making a silencer, but it  
20 may well be the market would be the people would use it  
21 as a muzzle brake only and that's all they would ever  
22 use it for.

23 THE COURT: If you sold -- to make this into a  
24 silencer you need a cover and a screw at the end.

25 MR. HALBROOK: Yes, your Honor, to hold it on.

1                   THE COURT: Okay. Do you sell the cover and  
2 screw at the end as separate items?

3                   MR. HALBROOK: No, your Honor, my  
4 understanding is Sig sells only complete silencers,  
5 which would have all the components. There's no reason  
6 to sell this part by itself, the muzzle brake part,  
7 because who would buy it, it's not a silencer.

8                   THE COURT: Okay, I'm not asking about that  
9 part. I'm asking about the cover and the screw that are  
10 necessary to convert it.

11                  MR. HALBROOK: That -- all the parts go  
12 together and that's the way they are sold is my  
13 understanding.

14                  THE COURT: Do you sell only the -- if I  
15 wanted to buy a replacement part for my silencer cover,  
16 I blew a hole in it, dented it or something and I want  
17 to call up Sig Sauer and say I would like to buy a cover  
18 for my silencer, would you sell them a cover for their  
19 silencer?

20                  MR. HALBROOK: They would have to buy a new  
21 silencer. That would have to be destroyed. It would  
22 have its own serial number on it. You'd go through the  
23 complete process --

24                  THE COURT: The answer is no, all right.

25                  MR. HALBROOK: Yes.

1                   THE COURT: So if you were, then, if you were,  
2 then, if you were to market this item, and you or  
3 anybody elsewhere were to sell a cover and cap that went  
4 over it, those people would be selling a silencer.

5                   MR. HALBROOK: They would, you'd have to go  
6 through the NFA process, yes.

7                   THE COURT: So, the cover and the cap would be  
8 fully regulable under the NFA, and one could not  
9 assemble a silencer from what you're doing without  
10 getting an NFA regulated part.

11                  MR. HALBROOK: That's absolutely correct, yes,  
12 your Honor.

13                  THE COURT: Because unlike your baffle core,  
14 which can be both a silencer part and a muzzle brake in  
15 your view, the tube and cap would be only useable for a  
16 silencer and therefore qualifies under the third --  
17 second or third definition of a silencer.

18                  MR. HALBROOK: Correct. And the cover would  
19 be marked with a serial number and company manufacturing  
20 information, all the information required by regulation.

21                  THE COURT: So as you see it, the purpose of  
22 the statute would not be fully eviscerated by allowing  
23 this product to be marketed because it's a dual, the  
24 baffle core is a dual use item, it is a single part, and  
25 it can be used, because it's a dual use item and

1 functions as a muzzle brake and a silencer part, and  
2 things that function as a silencer part and a muzzle  
3 brake, if they are sold as a muzzle brake, they're  
4 intended for sale as a muzzle brake, they can be used as  
5 a muzzle brake, they aren't solely for use in assembling  
6 a silencer, and therefore they're not regulable as  
7 silencers under the third prong of the --

8 MR. HALBROOK: Correct. And if I could just  
9 mention the Syverson case that Crooker relies on in  
10 part. It has three reasons for saying that what he  
11 claims to be his subjective intent is not his objective  
12 intent in actuality because in that case the court said  
13 muzzle brakes normally have these cuts through them like  
14 that. His was just plain. It was not cut with holes or  
15 any other protrusion.

16 Secondly, the court -- and the course this one  
17 has that. Secondly, the court said his was not an  
18 effective muzzle brake, it doesn't work as a muzzle  
19 brake. And this one we know does. We've got the video  
20 and ATF doesn't contest that.

21 Thirdly in that says, Syverson, it increased,  
22 I mean, I'm sorry, it decreased sound, and in this case  
23 we know that from ATF's own testing this increases  
24 sound.

25 THE COURT: Yeah, to me that's irrelevant

1 because it's not, I mean, you both have spent a lot of  
2 time on that, but --

3 MR. HALBROOK: Yes, your Honor.

4 THE COURT: -- that's irrelevant, because  
5 whether it decreases or increases sound, it's not  
6 intended to be a fully functioning silencer.

7 MR. HALBROOK: Correct.

8 THE COURT: They're not arguing that it is.  
9 They are saying it's a silencer because it qualifies  
10 under the third component. So, whether it reduces sound  
11 by itself or not is irrelevant. I assume it doesn't  
12 reduce sound, but I don't think that matters one wit to  
13 the analysis.

14 MR. HALBROOK: The other thing we brought just  
15 to show the Court was ATF calls this a muzzle brake, not  
16 a silencer, and with this object on it it does decrease  
17 the decibels. It makes the gun --

18 THE COURT: Well, if I put an empty coke  
19 bottle, a coke bottle over my gun and fired at something  
20 it decreases the sound.

21 MR. HALBROOK: It does, yes, sir.

22 THE COURT: And that's your silencer. So, I  
23 mean, again, I don't think that's the issue.

24 MR. HALBROOK: But ATF argued that, I mean,  
25 they had a list of or pictures of things that are not

1       silencers. This is one of them. And if you put this on  
2       this device, it will do the same thing as on this other  
3       device that is concededly just a muzzle brake.

4                     THE COURT: Yeah. Their argument is, and I  
5       know I'm oversimplifying, but if it looks like a duck  
6       and quacks like a duck it's a duck, you know, that's  
7       what your argument -- and believe me, I'm sympathetic to  
8       that argument as a practical matter. It's whether as a  
9       legal matter it makes any difference. But that's what  
10      you keep coming back to. It looks like a duck, it  
11      quacks like a duck, it is a duck. Come on, judge, wake  
12      up.

13                  MR. RYAN: Not at all, sir. If it looks like  
14       a duck, quacks like a -- you aren't allowed to call it  
15       an elephant, and that's really what we're going with.

16                  I would point out that in the administrative  
17       record, the one part that I think I disagree with, Adam  
18       Henshaw I think his name is, 623 to 640 in the  
19       administrative record, he actually talks, you do  
20       actually or Sig will provide you with the tube and the  
21       screw if you go through the process. So they do in fact  
22       sell those separately according to what we have in  
23       the --

24                  THE COURT: He says as separate silencers.

25                  MR. RYAN: As devices that don't include the

1 baffle stack, sir, I just want to make sure we're clear  
2 on that.

3 THE COURT: But it's important to me. They  
4 will sell the tube and screw. You said the  
5 administrative record, you've identified the pages so my  
6 clerk can go back and look, says we will sell people  
7 tubes and screws. So I accept that. He says we will do  
8 that only by selling it as an NFA silencer. They have  
9 to be registered. They have to pay the tax. A person  
10 possessing it is going to be deemed to be possessing a  
11 silencer even though they don't have the baffle core.  
12 And that's what they say. Is that right or wrong?

13 MR. RYAN: I think that's right, sir. It's my  
14 understanding that my friend on other side was talking  
15 about the fact they would have to destroy it and you  
16 would get a new one and they would never sell you  
17 another part. If someone bought this as a muzzle brake,  
18 they would have a muzzle brake and you couldn't get the  
19 other part. I understood that from what he was saying

20 --

21 THE COURT: You could get the other part but  
22 you'd have to buy a silencer.

23 MR. RYAN: And Sig would sell you those.

24 THE COURT: Yeah, as a silencer. They would  
25 say, no, we're selling now a silencer. If this product

1 is on the market, you're not going to be able to sell a  
2 cover and a screw except as a silencer.

3 MR. HALBROOK: Absolutely not, your Honor.

4 THE COURT: And that's, I think that's, his  
5 argument that the statute gets eviscerated. No, it does  
6 make it easier that someone now having bought this has  
7 fewer parts to fabricate themselves to make a silencer,  
8 but it doesn't completely eviscerate the law because if  
9 you were to try to sell it, or some third party  
10 aftermarket company were to sell tubes and screws that  
11 fit over your baffle core, it's hard to see how those  
12 tubes and screws would function as anything other than  
13 to be used in assembling a silencer, and they would have  
14 to be sold under the NFA requirements.

15 MR. HALBROOK: We've made that, from the very  
16 first submission to ATF, we've made that clear that this  
17 product can be used for various purposes and it comes  
18 under what your Honor has described as dual use --

19 THE COURT: You describe it in the record as  
20 dual use.

21 MR. HALBROOK: We do as well.

22 THE COURT: It is dual use. It requires more  
23 parts to complete the second use, but you've always  
24 said, you've been quite frank, it's dual use.

25 Okay, let me hear briefly from the other side

1 on objective intent and Chevron deference versus  
2 Skidmore deference. I think I understand your argument  
3 on this point reasonably well. Your argument is that we  
4 do have to prove that under the third prong that  
5 somebody intended this for use only in connection with  
6 the assembly of a silencer. But they don't mean -- I  
7 think your argument is, judge, when the statute says  
8 intended, they don't mean subjectively intended only,  
9 they mean objectively intended as well. So we need not  
10 prove subjective intent in order to treat a part as a  
11 silencer. It is sufficient if we are satisfied that its  
12 objective intent is to be used in assembling a silencer.  
13 Is that your position?

14 MR. RYAN: Yes, your Honor.

15 THE COURT: And you're saying we have special  
16 expertise as an agency. Under the law you should accord  
17 deference to our expertise. The term intended is  
18 ambiguous. It could be read to mean only subjective  
19 intent, or it could be read to mean objective intent.  
20 We get to decide that because we're the expert agency.  
21 We're deciding in this letter that it's objective. And  
22 we believe the evidence in this case leads us to the  
23 conclusion that it's objectively intended to be used as  
24 a silencer. You need to defer to that judgment, and  
25 when you do, our action is not arbitrary and capricious.

1           Is that a fair statement of what your argument  
2 is?

3           MR. RYAN: Yes, your Honor.

4           THE COURT: Okay. So, you believe that  
5 standard of deference is Chevron deference?

6           MR. RYAN: Based on the Barker factors.

7           THE COURT: Yeah, let's run through those with  
8 me because Chevron/Barnhart together -- excuse me,  
9 Meade/Barnhart together identify certain things that a  
10 court ordinarily should consider in determining whether  
11 to give Chevron deference.

12          Why do you think the facts in this case  
13 warrant Chevron deference.

14          MR. RYAN: If you look at the Innovator case,  
15 sir, they went through that in some detail, and I'll  
16 point the --

17          THE COURT: Decided against you.

18          MR. RYAN: The Innovator case, and I was going  
19 to say, sir, because it was a two-page report without  
20 any testing or other things and it dealt with a device,  
21 so it's a little different. Some of the things that the  
22 court decided against --

23          THE COURT: But it's important that -- you  
24 aren't enacting a regulation; right?

25          MR. RYAN: That's right, sir.

1                   THE COURT: There's nothing that suggests that  
2 Congress specifically intended you to resolve statutory  
3 construction problems on the meaning of intent.

4                   MR. RYAN: That's right, not on the meaning of  
5 intent, sir.

6                   THE COURT: Okay. You didn't put this out for  
7 notice and comment, you didn't solicit public views  
8 about it.

9                   MR. RYAN: That's correct.

10                  THE COURT: You issued it in connection with a  
11 letter. You didn't engage in any kind of formal process  
12 in which anybody other than Sig Sauer was entitled to  
13 offer input.

14                  MR. RYAN: That's right, no official hearing  
15 or anything like that, sir.

16                  THE COURT: And your view is now everybody,  
17 all courts in the United States, including the Supreme  
18 Court of the United States, must accept your view based  
19 on that ruling, that this is objective intent.

20                  MR. RYAN: Not as to the -- only as to the  
21 firearm and the objective characteristic and ATF's  
22 classification of it, sir, and so when I talk about --

23                  THE COURT: No, but in terms of intended, what  
24 the meaning of the word intended is, you believe that  
25 you have the authority to construe that to mean

1 objectively intended. You believe that interpretation  
2 you're giving has to be followed by all courts of the  
3 United States, including the Supreme Court of the United  
4 States, everybody must agree with you that intended in  
5 that statute means objectively intended.

6 MR. RYAN: I think that's a difficult position  
7 to take, sir.

8 THE COURT: But that's what you mean.

9 MR. RYAN: Well, but --

10 THE COURT: Crooker I have to ignore. Your  
11 position is, even though the First Circuit is above me  
12 and even though the First Circuit in Crooker said  
13 subjective intent governs in a 921 issue as to what a  
14 silencer is, you say I must disregard Crooker.

15 MR. RYAN: No, sir, not at all.

16 THE COURT: How can I reconcile your  
17 interpretation with Crooker?

18 MR. RYAN: Crooker dealt with a device that  
19 was not, that was not in any way shown, and the  
20 government never even tried to show, it put nothing in  
21 Crooker, for example. The government never tried to  
22 show intent at all. What Crooker said was, hey, that  
23 intent is important, but it never got to whose intent  
24 we're talking about when, for example, in this case it's  
25 a commercially developed silencer.

1                   THE COURT: To the extent that Crooker is read  
2 to say that subjective intent is required, because  
3 that's how I construe Crooker, and that's how every  
4 judge in the First Circuit construes Crooker when they  
5 give an instruction in a 921 case, which we do all the  
6 time, you're saying that's wrong. We have to change our  
7 instructions now. We now have to instruct every jury in  
8 the United States with a 921 case, has to be instructed  
9 that you need not prove, the government need not prove  
10 that this defendant, this felon in possession of a  
11 firearm, allegedly, intended that this device be used as  
12 a, subjectively intended that this device be used as a  
13 silencer, it is sufficient if he objectively intended  
14 it. From now on, contrary to all the criminal jury  
15 instructions everywhere in the United States, we now all  
16 have to go with what you're saying, and criminal  
17 defendants no longer can get out of an indictment for  
18 being a felon in possession of a firearm by arguing the  
19 defense whatever, whatever he says was objectively  
20 intended, I didn't intend it. And that's the law in the  
21 First Circuit. That's the law in every circuit. You're  
22 saying we can't follow that law anymore.

23                   MR. RYAN: No, sir --

24                   THE COURT: How do I follow that law and adopt  
25 your interpretation?

1                   MR. RYAN: What Crooker dealt with was the  
2 complete device that was not for --

3                   THE COURT: Right, but in reaching the  
4 conclusion they completely, they said you have to show  
5 subjective intent. If I pulled out my jury instructions  
6 that I give in every one of these cases, it would say he  
7 must have intended. It's not sufficient if a reasonable  
8 person would have understood that it would be used as a  
9 firearm. You must -- you have to prove beyond a  
10 reasonable doubt that this person intended, otherwise  
11 you're not a felon in possession of a firearm, okay.  
12 That's the law that now I have to change based on some  
13 letter that you give to Sig Sauer.

14                  MR. RYAN: No, your Honor. What the  
15 government can do in those cases is come back and say  
16 here's all of the evidence that shows what the intent  
17 was, and that you can show by, for example, under the  
18 Staples case, the case from the Supreme Court --

19                  THE COURT: I understand the argument that you  
20 can only, and I give this instruction, okay, I've been  
21 doing this for a long, long time, all right, I can give  
22 you instructions off the top of my head, but what we say  
23 to people is, intent is a difficult thing to prove. You  
24 can't get inside someone's head. You can only rely on  
25 external evidence. You can consider circumstances and

1 infer somebody's intent. If that's all you were saying,  
2 that's not objective intent. That is circumstantial  
3 evidence establishes subjective intent. You're saying  
4 something different, which is objective intent. And  
5 that's not the evidence can persuade you that somebody  
6 subjectively intended.

7 So how can I give an instruction that you must  
8 prove that somebody subjectively intended if the ATF  
9 response in the Sig Sauer case is now the binding law  
10 across the United States in all criminal cases enforcing  
11 921 violations, how do I do that?

12 MR. RYAN: I'm not sure how to answer the  
13 question, sir.

14 THE COURT: Yeah, it's a problem for you,  
15 that's why, it's tough.

16 MR. RYAN: And I understand, I do understand  
17 the argument. The problem is, is that there are other  
18 cases, for example, that we cited, that talk about, for  
19 example, the Focht case which was a fireworks case, and  
20 the Poster 'N' Things case from the Supreme Court that  
21 talked about yet although somebody can say these things,  
22 you look at what the use is in the community. ATF knows  
23 that from going about and looking at all of these  
24 things.

25 THE COURT: Yeah, but right now the government

1 can't put somebody in jail for being a felon in  
2 possession of a silencer unless they prove beyond a  
3 reasonable doubt that that, if they have a, that what  
4 they have is intended for use as a silencer, okay.  
5 Everybody else in the world but this guy would see that  
6 this is a silencer is not enough. That evidence might  
7 persuade you that he actually intended it, but the  
8 elements of the claim is he had to subjectively intend  
9 it.

10 Now, I understand you to be explaining that is  
11 not correct. Every court and every judge across the  
12 country in criminal cases has been misinterpreting what  
13 intended means. We know what it means, and it means  
14 objectively intended. That's what you're saying, isn't  
15 it?

16 MR. RYAN: Well, I -- perhaps what it is,  
17 then, your Honor, is an inartful use of objective.  
18 Objective from the perspective of ATF, because they  
19 don't necessarily have a trial where they put everything  
20 out, they get the submission from the individual, then  
21 have to look at the known universe of items and what  
22 these items are, and figure out what the actual intent  
23 is.

24 THE COURT: Do you have any cases where the  
25 objective intent standard that you're using is explained

1 in the decision?

2 MR. RYAN: In our briefs, your Honor, we spoke  
3 about the Poster 'N' Things case. I can get the --

4 THE COURT: Does it talk about objective  
5 intent?

6 MR. RYAN: It talks about primarily intended  
7 and the community standard, so, not just that  
8 individual. And then also I believe the Focht case,  
9 which is the fireworks case, of what these things, you  
10 know, objectively would be going out to the community  
11 and if they could be used in commercial grade fireworks  
12 and not just individual, even though the producer or the  
13 manufacturers themselves intend them to be --

14 THE COURT: Well, here's a case you guys ought  
15 to look at. I don't know if you cited it. Did anybody  
16 cite the Brown and Williamson case, Supreme Court case,  
17 FDA versus Brown and Williamson? It's reported at 120  
18 Supreme Court 1291. It's a drug case and it deals with  
19 the concept of objective intent. And let me read  
20 something to you and you tell me if this is along the  
21 lines that you're thinking about. Quoting now, nor is  
22 the FDA's objective intent interpretation unreasonable.  
23 It falls well within the established scope of the  
24 ordinary meaning of the word intended, citing Agnew  
25 against United States with a parenthetical that says

1 intent encompasses the known consequences of an act, end  
2 of parenthetical, and the company's acknowledge that the  
3 FDA can regulate a drug like substance in the ordinary  
4 circumstance, i.e. where the manufacturer makes an  
5 express claim so it is not unreasonable to conclude that  
6 the agency retains such power where a product's effects  
7 on the body are so well know, say, like those of aspirin  
8 or Calamine lotion, that there is no need for express  
9 representation because the product speaks for itself.

10 That sounds a lot to me like what you're  
11 arguing is meant by the word intended. Does that  
12 resonate with you? I'm trying to get a handle of what  
13 your argument is.

14 MR. RYAN: It does, sir, and it's close to  
15 what the Crooker court alluded to.

16 THE COURT: Okay, that's where we part  
17 company.

18 MR. RYAN: Well, when it spoke about the  
19 government wouldn't have to come in until when there's a  
20 commercially developed thing that this is what it is, we  
21 know that's what it is, and I can provide you that --

22 THE COURT: Okay, let's start again, okay.  
23 So, do you understand, when I say the word subjectively  
24 intended, I mean what is actually -- I'm saying I  
25 subjectively intended something. That means it's

1 actually in my mind. I am intending this to occur;  
2 right?

3 MR. RYAN: Yes, sir.

4 THE COURT: Okay. That's a form of the, a  
5 usage of the word intended, is it not, to refer what's  
6 actually in somebody's mind?

7 MR. RYAN: Yes, sir.

8 THE COURT: Okay. Now, where I don't tell you  
9 what I'm intending to do, sometimes you can figure out  
10 what I'm intending to do by watching me; right?

11 MR. RYAN: Yes, sir.

12 THE COURT: So, if I am doing this act right  
13 now, and I'm not telling you that I'm intending to pick  
14 up this file, you can infer that I'm intending to pick  
15 up the file, because you are watching me do it; right?

16 MR. RYAN: Yes, sir.

17 THE COURT: So that is an action of which  
18 subjective intent and inferring what's in my mind even  
19 though I don't tell you, okay, that's using objective  
20 evidence to infer what is actually in my mind, okay?  
21 That is still subjective intent. That's using objective  
22 evidence to infer what's in my mind.

23 What I understand the Supreme Court meant in  
24 Brown and Williamson is not that. They meant something  
25 that gave broader power to the FDA; that is, it doesn't

1 matter what's in the manufacturer's mind when they're  
2 selling aspirin. The effects of aspirin are very  
3 well-known by people who sell it, and they objectively  
4 intend those effects whether they are subjectively  
5 thinking it or not. In other words, we don't have to  
6 prove that they thought in their mind we want to use  
7 this as a silencer. We just don't have to prove that.  
8 It's sufficient if the circumstances lead us to conclude  
9 that a person in their position would know of the  
10 effects of their action and they would know that this  
11 would be used as a silencer.

12 I think your argument is this latter example,  
13 not the example of which you can infer what's in Sturm  
14 Ruger's mind by what they did, and we show they  
15 subjectively intended. No, I don't think you can be  
16 saying that. I think they're saying, we don't have to  
17 show what's in Sturm Ruger's mind. We have shown that  
18 anyone with their knowledge would understand that this  
19 is a silencer part that they're selling, and by selling  
20 it under these circumstances, any reasonable person  
21 would know that this is going to be used as a silencer,  
22 and that's enough for us to say it's a silencer,  
23 regardless of what they're subjectively thinking.

24 I thought that's your position. Is that your  
25 position or is it not?

1                   MR. RYAN: Yes, yes, sir, I believe it is.

2                   THE COURT: So, your position is an objective  
3 intent is what the word intended should mean; right?

4                   MR. RYAN: Yes, sir.

5                   THE COURT: Crooker would not permit a person  
6 to be convicted without proof that they subjectively  
7 intended. I don't know, Mr. Plourde hasn't done this  
8 kind of work but his colleague in the back of the room  
9 has done it for many, many years, if she disagrees with  
10 me, she should go up and tell Mr. Plourde, and she's now  
11 shaking her head no, because she knows subjective intent  
12 is an essential element of one of these violations. The  
13 theory that you are propounding will change the  
14 instruction that has to be given in every criminal case  
15 in the United States under 921(c) where there is a felon  
16 in possession of a firearm charge. That's the effect of  
17 your letter to Sturm Ruger if what you're saying is  
18 correct. Now, just explain to me why that shouldn't be  
19 the effect.

20                  MR. RYAN: And as I said before, sir, it may  
21 simply be that what we're looking at are the objective  
22 features in making this classification. That  
23 objectively, when you look at these things, you know,  
24 and I understand your point on that, but you know that  
25 based on this, this is what the thing must be. And so

1 what you're looking at objectively is the item itself,  
2 all the items that are out there in coming to a  
3 conclusion about this is the intent.

4 And so I understand that --

5 THE COURT: How is your expertise about what  
6 intended means in the statute any greater than mine?

7 MR. RYAN: It's not, your Honor, it's  
8 knowledge of the device itself.

9 THE COURT: The application of what intended  
10 means, I think you have substantial expertise that I  
11 don't have. What intended means doesn't require any  
12 expertise. Doesn't require ATF knowledge. Doesn't  
13 require scientists and engineers, explosive experts, gun  
14 designers, it just requires looking at what the word  
15 means in context.

16 So, I don't think there's the -- the legal  
17 question, what does intended mean, doesn't seem to  
18 require expertise. The application of what intended  
19 means requires substantial expertise, and your judgment  
20 should be entitled to more deference on that.

21 MR. RYAN: That's correct, yes, sir.

22 THE COURT: Okay. What other reasons do you  
23 want to offer as to why I should give Chevron deference  
24 to your judgment about what intended means, not the  
25 application of, but what intended means?

1                   MR. RYAN: Well, I think that our arguments  
2 are for the application of that, sir, so all of those  
3 Barnhart standards --

4                   THE COURT: Here is the problem, though. You  
5 told me that your case is based on an interpretation of  
6 the word intended. That means objective intent. If  
7 you're wrong about that, then your analysis falls apart.  
8 If that's a pure legal question, and you don't have any  
9 greater expertise than I do on it, if you haven't  
10 enacted your interpretation through rule making, if you  
11 haven't used formality and extensive judgment to acquire  
12 what intended means, then I should not accord Chevron  
13 deference to your interpretation, I should accord  
14 Skidmore deference to it.

15                  So, that's my thinking about, not application,  
16 because I think application, you're right, you're  
17 entitled to deference on it, but if you've done your  
18 analysis using an incorrect interpretation of law, your  
19 case falls apart, and that's the problem -- that's the  
20 core problem I'm having with your analysis.

21                  I'm not going to second guess you on whether  
22 this deflects gases or doesn't deflect gases and how  
23 silencers work and don't work. I assume you're the  
24 expert on those things. But what intended means in a  
25 statute that I've been instructing juries on for

1   20 years mean? I don't think your expertise is any  
2 greater than mine. In fact, I think mine is way greater  
3 than yours because I know how the word is used in the  
4 criminal law that is the principal statute that the  
5 phrase is in. I apply that law every day. You don't.  
6 You're dealing with NFA issues that come up once in a  
7 while. I deal with it all the time. I've probably had  
8 30 or 40 or 50, maybe more, felon in -- probably, no,  
9 several hundred felon in possession cases that I've had  
10 to deal with either to evaluate the elements for  
11 purposes of a guilty plea or have a trial on. So that's  
12 the problem.

13                 Any concluding comments on this particular  
14 issue?

15                 MR. RYAN: No, your Honor.

16                 THE COURT: All right. I'll hear your  
17 response to what he has to say.

18                 MR. HALBROOK: Your Honor, the case law is  
19 clear that we would never defer to the government in the  
20 interpretation of a criminal statute.

21                 THE COURT: I wish it were clear but it  
22 absolutely is not. In fact, the First Circuit has said  
23 otherwise. If Chevron deference, and I can show you the  
24 case, if Chevron deference requires adopting the  
25 agency's interpretation, the rule of lenity cannot save

1 a case.

2 Now Justice Scalia, one of my clerks showed me  
3 this yesterday, Justice Scalia agrees with you, or at  
4 least suggests strongly that he agrees with you because  
5 he objected to the denial of cert in a case this year  
6 and wanted briefed the question of should we ever apply  
7 Chevron deference in a criminal statute, leaving in his  
8 mind a great doubt. But the truth is, it's an  
9 unresolved question at the Supreme Court level. The  
10 Supreme Court has hinted both ways on that issue. The  
11 First Circuit, though, has said quite clearly the rule  
12 of lenity cannot be used to override an interpretation  
13 that's authorized under Chevron deference.

14 So, if there is Chevron deference here, I am  
15 -- and the second thing that the Supreme Court has said  
16 that's really shocked me is if Chevron deference  
17 requires an interpretation of a statute to say X, even  
18 if 20 years ago the U.S. Supreme Court interpreted the  
19 same statute to mean not X, the court has to follow the  
20 interpretation of the agency.

21 So, it is true that Chevron deference, where  
22 it requires a particular interpretation, would override  
23 Crooker. If they adopted this interpretation say in  
24 rule making, notice and comment rule making, and they  
25 said we think, and in fact the law is that they have the

1 authority to enact rules to implement 921, and they  
2 implemented 921 to have objective intent, and that  
3 standard required Chevron deference, and I looked at the  
4 meaning of the word intended and I said it was  
5 ambiguous, and if I said that it's ambiguous and their  
6 interpretation is a plausible interpretation, I would  
7 have to enforce it, and I would have to disregard  
8 Crooker.

9 MR. HALBROOK: Your Honor, Chevron one,  
10 though, says that if the statute's clear there's never a  
11 deference.

12 THE COURT: Right.

13 MR. HALBROOK: Chevron two applies to  
14 regulations, an agency's interpretation of regulation  
15 you defer to, but when you get in cases like Christensen  
16 on opinion letters like that's what this is, and you get  
17 into --

18 THE COURT: That's an argument that's, and I  
19 agree with you, I think there's a strong argument that  
20 Skidmore deference rather than Chevron deference should  
21 apply to informal agency adjudications of this sort on  
22 matters such as the one that's been raised here, and as  
23 to interpretations of law that come out of informal  
24 agency adjudications I'm inclined to agree with the  
25 general proposition of Judge Bates in the Innovator case

1 that Skidmore deference should apply.

2           But if Chevron deference applies, I'm telling  
3 you, I've researched this, personally, not my clerks,  
4 me, and I'm satisfied that first, under First Circuit  
5 law, if Chevron deference applies, I cannot adopt a  
6 contrary interpretation simply because the rule of  
7 lenity would require it.

8           MR. HALBROOK: Your Honor, if there's a -- the  
9 rule making power is given by the Congress to the  
10 agency, that's one thing.

11           THE COURT: Wherever Chevron deference is  
12 required.

13           MR. HALBROOK: But it doesn't even apply to  
14 classification letters by the Customs Department --

15           THE COURT: That's an argument that -- wait a  
16 minute, that's an argument that Chevron deference  
17 doesn't apply to classification letters. That's not an  
18 argument that the rule of lenity can override an  
19 interpretation that's warranted where there is Chevron  
20 deference.

21           MR. HALBROOK: Your Honor, the FCC versus ABC  
22 case that we cited by the Supreme Court said there  
23 cannot be one interpretation for the Department of  
24 Justice in criminal --

25           THE COURT: I agree, there has to be a

1 consistent interpretation. That's why I said if this is  
2 subject to Chevron deference and their interpretation is  
3 a plausible interpretation of an ambiguous statute, I  
4 have to adopt it, judges all across the country have to  
5 adopt it, the U.S. Supreme Court has to adopt it,  
6 assuming it's constitutional, we all have to adopt it.  
7 All right? I agree, that would be one interpretation,  
8 criminal and civil. I agree that there are real  
9 problems in my mind in according Chevron deference to an  
10 interpretation of the statute that is inconsistent with  
11 the rule of lenity. I agree that there are justices on  
12 the Supreme Court, Scalia being one, who would not apply  
13 Chevron deference to criminal statutes at all, but I can  
14 tell you, and I'll give you the quote because you seem  
15 to doubt me.

16 MR. HALBROOK: I don't doubt you, but the FCC  
17 versus ABC case did apply the rule of lenity, ruled  
18 against the agency, that was post-Skidmore, now to be  
19 sure it was before Chevron.

20 THE COURT: Okay, this is a 2005 First Circuit  
21 decision, Olivo versus Chavez, 394 F.3d 45. Now the  
22 First Circuit are my masters. I'm a faithful  
23 lieutenant.

24 MR. HALBROOK: Yes, your Honor.

25 THE COURT: They give an order, I salute

1 smartly and obey, okay? I have to follow their rule  
2 whether it's right or wrong. Here's what they say:  
3 "Perez-Olivo argues, however, that we should not give  
4 deference under Chevron to BOP's interpretation of the  
5 GCT statute. He argues instead that we should apply the  
6 rule of lenity. We disagree. The rule of lenity  
7 provides that where there is ambiguity in a criminal  
8 statute, doubts are to be resolved in favor of the  
9 defendant. Here we are evaluating the reasonableness of  
10 the BOP's calculation of reductions in a sentence for  
11 GTC which is not strictly speaking a criminal statute,  
12 and thus we do not believe the rule of lenity would  
13 apply. This determination, however, is unnecessary  
14 because even if we were to assume arguendo that the GTC  
15 statute was criminal, we know that, quote, the rule of  
16 lenity applies only if after seizing everything from  
17 which A can be derived we can make no more than a guess  
18 as to what Congress intended. Furthermore, the rule of  
19 lenity does not foreclose deference to an administrative  
20 agency's reasonable interpretation of a statute."  
21 Citing the Supreme Court's opinion in Babbitt: Quoting,  
22 we have never suggested that the rule of lenity should  
23 provide the standard for reviewing facial challenges to  
24 administrative regulations whenever the governing  
25 statute authorizes criminal enforcement."

1           I can cite to you cases from many other  
2 circuits. I can cite to you Supreme Court cases. In my  
3 view, if Chevron deference applies, you have to adopt  
4 the agency construction if the statute's ambiguous and  
5 it can be reasonably interpreted in the way the agency  
6 is interpreting it. I don't think Chevron deference  
7 applies here and therefore I don't think I'm obligated  
8 to do that, but if it did, I would have to defer.  
9 That's my judgment.

10           MR. HALBROOK: Your Honor, there's  
11 inconsistent cases. There's plenty of cases that say --

12           THE COURT: Not in the First Circuit.

13           MR. HALBROOK: We don't -- well, on matters  
14 where the agency's entrusted with making a decision like  
15 telling what is under some drug schedule maybe, but in  
16 terms of the NFA and the GCA, ATF doesn't have that  
17 power, the courts have consistently upheld the rules  
18 that you articulate in terms of the jury instructions,  
19 for example, on the word like intent, they don't defer  
20 to the government's interpretation, the rule of lenity  
21 does apply in cases of ambiguity.

22           We cited some of those cases in our briefs,  
23 and the Abramski case is maybe the last time the Supreme  
24 Court said that, they said we don't defer to the ATF.  
25 Sometimes they get it right, sometimes they get it

1 wrong.

2                   And just one other comment about positions  
3 taken by ATF. Understandably they want to have safe  
4 harbor rules, but sometimes they extend the safe harbor  
5 way out into the ocean and that's what we think has  
6 happened here. That they try to use some objective list  
7 of whether something's a silencer based on their list,  
8 and it really doesn't, it's not consistent with the  
9 language of the statute in terms of this, the third  
10 definition of silencer.

11                  THE COURT: Okay. Anything else you want to  
12 say on anything to deal with this case?

13                  MR. HALBROOK: Your Honor, I would just say  
14 that we've already had a very thorough remand in this  
15 case, and we think the case is ripe for decision on the  
16 merits.

17                  THE COURT: I would remand it to the, if they  
18 used an incorrect legal standard I would remand this to  
19 the ATF and let them decide using the correct standard  
20 because I think they're entitled to deference, so, I'm  
21 not inclined to simply rule on it. If my judgment is  
22 that they've made a mistake, they should get a chance to  
23 correct it, so, I'm inclined to remand it.

24                  MR. HALBROOK: I would just say in this case,  
25 I mean, normally we would have litigated and you would

1 have remanded it and then it would have come back to the  
2 Court, but we took the voluntary remand already and the  
3 case has already extended --

4 THE COURT: Yeah, as I said, in my view  
5 there's a good argument here that Skidmore deference  
6 should apply. If Skidmore deference should apply,  
7 there's an argument that the First Circuit in Crooker is  
8 correct and that subjective intent is required.

9 If subjective intent is required, it appears  
10 to me that the ATF used an incorrect legal standard when  
11 it judged -- when it considered whether this is a  
12 silencer or not. If it used an incorrect legal  
13 standard, its analysis can't survive.

14 But I don't know whether this would qualify as  
15 a silencer under the correct determination or not, and  
16 it's not up to me to decide that now.

17 So, you could go -- I'm not going to make a  
18 determination that this is not a silencer. I'm just  
19 going to make a determination if you're right, that they  
20 acted arbitrarily and capriciously in concluding  
21 otherwise. It might be a silencer, if they used a  
22 correct analysis.

23 Now, you don't have to go back and get a  
24 confirmation letter from them. You can go ahead and  
25 manufacture it, and if they indict you, you can deal

1 with it. And then if they indict you and deal with it,  
2 I'll deal the question then, but I think they're  
3 entitled to determine using a correct legal standard  
4 whether this is a silencer or not.

5 So, I understand you don't like it, but, you  
6 know, they don't like that I have some concerns with  
7 their interpretation of the statute.

8 MR. HALBROOK: If I could just add that the F.  
9 J. Vollmer case that we cited in our brief is an example  
10 of the Circuit opinion saying that a remand is  
11 unnecessary when the facts are clear and the law is  
12 clear --

13 THE COURT: The facts and the law aren't clear  
14 here to me. I think there's, you know, it does appear  
15 to me that you guys know very well that this is a  
16 silencer part, and it does appear to me that this is not  
17 likely to have a significant market as a muzzle brake.

18 So, whether that means it's a silencer or not  
19 is an issue that the ATF should decide, but they need to  
20 do it under the correct standard, and they need to do it  
21 in a way that's not arbitrary and capricious. It's hard  
22 to do. It takes some work.

23 I'm concerned that they have not used the  
24 correct standard here, but they need to consider whether  
25 under the correct standard it is a silencer or not. But

1 to say this isn't a silencer --

2 MR. HALBROOK: Your Honor, given the --

3 THE COURT: I don't know what you're  
4 subjectively intending, but it certainly raises concern  
5 that you're subjectively intending to sell this as a  
6 silencer.

7 MR. HALBROOK: Your Honor.

8 THE COURT: I'm not going to say it's clear as  
9 a matter of law without holding any trial that this is  
10 not a silencer.

11 MR. HALBROOK: ATF had all the time in the  
12 world. They had several months to evaluate it and to  
13 ask for any information.

14 THE COURT: I understand, but.

15 MR. HALBROOK: But, you know, your Honor, the  
16 Innovator case, it still hasn't come back from the  
17 agency, which was decided well over a year ago.

18 We would hope the Court would reconsider and  
19 not remand it if you agree with --

20 THE COURT: I think substantively it's a very  
21 important issue, this statute is a very significant  
22 statute, and I am not going to be the one to say without  
23 holding any trial, receiving any evidence, making any  
24 findings of fact, that I'm concluding as a matter of law  
25 that this is not a silencer and you can go ahead and

1 sell it around the world. I'm not going to do that.  
2 That would -- that is a -- something that requires very  
3 careful consideration of evidence.

4 MR. HALBROOK: Your Honor, if you do remand  
5 the case, we would ask if you would set the deadline for  
6 them to report back because, as I say, the Innovator  
7 case is still hanging there after well over a year.  
8 This case has been going on a significant period of time  
9 and we'd appreciate it if there would be some deadline  
10 for reporting back to the Court if you do remand.

11 THE COURT: All right. Thank you. Anything  
12 you want to say in addition to what you've already said  
13 here?

14 MR. RYAN: No, your Honor.

15 THE COURT: So I'm going to continue to think  
16 about this, but I think it should be obvious to you  
17 guys. I spent a lot of time reading and thinking about  
18 this case, so I'm going to work on it hard, I'm going to  
19 get a decision out before the end of August, and I do  
20 have, I want to be clear, I have some significant  
21 concerns that the ATF, although well intentioned, has  
22 not correctly interpreted the statute. I'm concerned  
23 that the ATF, the ATF's contrary interpretation is not  
24 entitled to Chevron deference, and that the deference  
25 that it is entitled to does not warrant the adoption of

1 the ATF's interpretation.

2 I am also concerned that the ATF has not  
3 correctly applied Section 3 to the evidence in the case  
4 here and that therefore it acted arbitrarily in failing  
5 to sufficiently comment upon and assess the argument  
6 that the -- that Sig Sauer made under Section 3.

7 I have those concerns. To the extent that  
8 they turn out to be meritorious concerns and I determine  
9 that the ATF decision cannot stand, my strong preference  
10 would be and current intention would be to remand the  
11 matter so that the ATF could consider the issue under a  
12 correct standard, and my inclination would be to meet  
13 with the parties after issuing the order, determine  
14 whether somebody is going to take an appeal so we can  
15 get this thing moving, and talk to you about what kind  
16 of process we could agree on to get a relatively  
17 expeditious redetermination of the issue by the ATF.

18 So, if the decision comes out the way I'm  
19 currently thinking it should come out, you need to be  
20 thinking about how you will both respond when I call you  
21 on the phone and say what do you want to do from here.  
22 Okay?

23 MR. HALBROOK: Yes, your Honor.

24 THE COURT: Anything else? All right, thank  
25 you. I appreciate your argument and your briefing.

1 MR. HALBROOK: Thank you, your Honor.

2 (Hearing concluded at 5:00 p.m.)

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C E R T I F I C A T E

7

8 I, Sandra L. Bailey, do hereby certify that  
9 the foregoing transcript is a true and accurate  
10 transcription of the within proceedings, to the best of  
11 my knowledge, skill, ability and belief.

12

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14 Submitted: 8/4/2015

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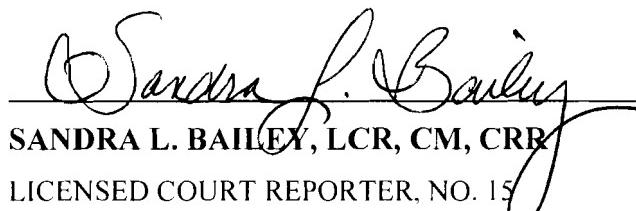
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